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“Allah loves the shipowner. He distanced the resources and raw materials remote from where they were demanded and covered two-thirds of the earth with water”

(Talal Aladwani)

**A comparative study of the obligation of due
diligence to provide a seaworthy vessel under
the Hague/Hague-Visby Rules and the Rotterdam
Rules**

by

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Abstract

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“A comparative study of the obligation of due diligence to provide a seaworthy vessel under the Hague/Hague-Visby Rules and the Rotterdam Rules”

In the last 100 years, vast technological and communicational changes have occurred in all modes of transportation, with momentous changes to the carriage of cargo by sea. In response, the shipping industry has attempted to codify, at the international level, regulations and standards with the aim of providing a safe environment at sea. In turn, the shipping industry's regulations impact upon the way sea carriage is performed. The obligation of seaworthiness is no exception. The requisite standard of seaworthiness is also, to a limited extent, governed by the shipping industry's regulations.

It is notable that the shipping industry's regulations cannot keep pace with technological developments and they therefore lag behind the latest inventions. This creates an imbalance in the risk borne between the parties to the contract of carriage. Accordingly, the current law on seaworthiness requires modification in order to keep up with the technological evolution in the shipping industry. For such reasons, the Rotterdam Rules and its provisions on seaworthiness, were agreed.

This thesis focuses on the scope of the provisions that relate to the obligation of seaworthiness in the Rotterdam Rules as compared to the parallel obligation in the existing regime under the Hague/Hague-Visby Rules. In order to ascertain whether the new convention provides a sound system to govern the law relating to seaworthiness, it is necessary to deal

with the carrier's obligation of seaworthiness under the Rotterdam Rules as compared to the widely used regime of the Hague/Hague-Visby Rules.

However, the Rotterdam Rules introduce additional changes to the regime governing the carriage of goods; for example, multimodal transport. These changes are also considered in this study. This thesis discusses the impact of multimodal carriage on the obligation and liability of seaworthiness. It proposes that a multimodality approach should not be used with particular types of sea carriage; for example, container carriage.

Throughout the thesis, proposals for both regimes concerning changes to areas where the risk between the contracting parties is imbalanced are provided. This inevitably involves a detailed study on the provisions relating to the obligation of exercising due diligence (and related potential liabilities in case of breach) under the Hague/Hague-Visby Rules and the Rotterdam Rules.

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ABBREVIATIONS

Shipping industry

ADR Standards	Carriage of Dangerous Goods by Road Standards
BS Code	Bulk Solid Cargo Code
CCNR	Central Commission for Navigation on the Rhine
CTL	Constructive Total Loss
DPA	Designated Person Ashore
EDI	Electronic Data Interchange
FIOS	Free in and out stowed
MTO	Multiple Transport Operator
NPYE	New York Exchange Time Charter
RO-RO	Roll on, Roll off ships
SAIEC	The State Administration for the Inspection of Import and Export Commodities
SF	Estimated Stowage Factor
SWL	Safe Working Loads
TEU	Twenty Foot or Equivalent Units
TML	Transportable Moisture Limit

Shipping and inland carriage regulations

FSS Code	International Code for Fire Safety System
IBC Code	International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk
IGC Code	International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk
ILO	International Labour Organization

IMDG Code	International Maritime Dangerous Goods Code
IOPC Fund	International Oil Pollution Compensation Fund
ISM Code	International Management Code for the Safe Operation of Ships and for Pollution Prevention (International Safety Management Code)
ISPS Code	International Ship and Port Facility Security Code
ITOPF	International Tanker Owners Pollution Federation Limited
LL	Load Line Convention
MARPOL	The International Convention for the Prevention of Pollution from Ships
MSA	Merchant Shipping Act
MSN	Merchant Shipping Notices
MSR	Merchant Shipping Regulations
SMPEP	Shipboard Marine Pollution plan for Noxious Liquid Substances
SOLAS	Convention for the Safety of Life at Sea
SOPEP	Shipboard Oil Pollution Emergency Plan

Carriage organisations

BIMCO	Baltic and International Maritime Council
CI CEVNI	The <i>European Code for Inland Waterways</i>
CIM	Uniform Rules concerning the Contract for International Carriage of Goods by Rail
CMI	Comite Maritime International / International Maritime Committee
CMNI	Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways
CMR	Convention on the Contract for the International Carriage of Goods by Road
COGSA	Carriage of Goods by Sea Act

COTIF	The Berne Convention concerning International Carriage by Rail
FIATA	International Federation of Freight Forwarders Associations
HR	International Convention for the Unification of Certain Rules of Law relating to Bills of Lading. 1924 (The Hague Rules)
HVR	Brussels Protocol amending the Hague Rules relating to Bills of Lading, 1968 (The Hague-Visby Rules)
ICC	International Chamber of Commerce
ICS	International Chamber of Shipping
IMMTA	International Multimodal Transport Association
IMO	International Maritime Organization
IRU	International Road Transport Union
IUMI	International Union of Marine Insurance
M-COTIF	Convention of International Rail Traffic
MSC	Maritime Safety Committee
MT Convention	United Nations Convention on International Multimodal Transport of Goods
NGO	Non-Governmental Organisation
OTIF	Intergovernmental Organisation for International Carriage by Rail
P&I Club	Protection & Indemnity Club
TCM	Draft Convention on the International Combined Transport of Goods
The Rotterdam Rules	United Nations Convention on the Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules 2009)
TIA	Transport Intermediaries Association
UN	United Nations
UNCTAD/ICC Rules	UNCTAD/ICC Rules for Multimodal Transport Documents
UNCITRAL	United Nations Committee on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UN Doc.	United Nations Documents

UNECE	United Nations Economic Commission for Europe
UNIDROIT	International Institute for the Unification of Private Law
U.S.C.	United States Code

Courts

A.C.	Appeal Court
Ad & El	Adolphus and Elli's Reports
All ER	All England Law Reports
A.L.R.	American Law Reports
ALR	Australian Law Report
AMC	American Maritime Cases
App.	Appellate Reports
App Cas	Law Reports Appeal Cases
Asp MLC	Aspinall's Maritime Law Cases
A&NZ Mar LJ	Australia and New Zealand Maritime Law Journal
C.A.	Court of Appeal
C.A. (9th Cir)	US Court of Appeals (9 th Circuit)
Cal. App.	California Court of Appeal
CBNS	Common Bench Reports
C.F.R.	Code of Federal Regulations
Cir.	Circuit
CLR	Commonwealth Law Reports
Com. Cas.	Commercial Cases
DLR	Dominion Law Reports (Canada)
D. Md.	United States District Court, D. Maryland
DMF	Le Droit Maritime Francais
Dow	Dow's House of Lords Cases
EWHC (Comm)	High Court of England and Wales (Commercial Division)

FC	Canada Law Reports, Federal Court
F & F	Foster and Finlayson's Reports
F. Supp.	Federal Supplement
FTR	Federal Trial Reports (Canada)
F.2d	Federal Report, Second Series
F.3d	Federal Reporter, Third Series
H.C.	High Court
H.L.	House of Lords
K.B.	King's Bench Law Report
KBD	King's Bench Division
L.J. Ex.	Law Journal, Exchequer
LI. L. Rep.	Lloyd's List Law Reports
L.R.	Law Reports
LR QB	Law Reports, Queen's Bench
MPR	Maritime Provinces Reports (Canada)
N.W.	North Western Reporter
NZSC	New Zealand Supreme Court
OLR	Ontario Law Reports (Canada)
P	Law Report Probate
P.C.	Privy Council
Q.B.	Queen's Bench
QBD	Queen's Bench Division
S. Ct.	United States Supreme Court Reporter
S.D.N.Y.	United States District Court, S.D. New York
S.E.	South Eastern Reporter
SLR	Singapore Law Reports
Sup. Ct.	Supreme Court

Sup. Ct. NSW	Supreme Court New South Wales
Sup. Ct (NZ)	New Zealand Supreme Court
TLR	Times Law Reports
TLR	
U.S.C.A.	United States Code Annotated

Journals

Aus. Bus. L. Rev.	Australian Business Law Review
EJCCL	European Journal of Commercial Contract Law
IJMCL	International Journal of Marine and Coastal Law
IJSL	The International Journal of Shipping Law
J.B.L.	Journal of Business Law
JIML	Journal of International Maritime Law
JMLC	Journal of Maritime Law and Commerce
LI. L. R	Lloyd's List Law Report
Lloyd's Rep.	Lloyd's Law Report
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
MLAANZJ	Maritime Law Association of Australia and New Zealand Journal
M.P.M	Maritime Policy and Management
N.Z.L.R.	New Zealand Law Review
SIMPLY Yearbook	Scandinavian Institute of Maritime Law Yearbook
Tex. Int. L. J.	Texas International Law Journal
Tul. L. Rev.	Tulane Law Review
Tul. Mar. L.J.	Tulane Maritime Law Journal

AUTHOR'S DECLARATION

At no time during the registration for the degree of Doctor of Philosophy has the author been registered for any other University award without prior agreement of the Graduate Committee.

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Recent Publications

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- Aladwani, T., 'The Supply of Containers and 'seaworthiness' - The Rotterdam Rules Perspective' (2011) 42 JMLC, pp. 185-209

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Conference Presentations

- Aladwani, T., "Are Shipping Standards Worthy to Regulate Seaworthiness?", The Society of Legal Scholars: Edinburgh University, 3-6 September 2013
- Aladwani, T., "*The effect of shipping standards on the charterparty obligation of seaworthiness*", XVII European Colloquium on Maritime Law Research: Contracts in Shipping: Flexibility, Foreseeability, Reasonableness, Palermo, Italy, 2012
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CHAPTER ONE

INTRODUCTION

“The vessels of the future must be able to meet clear goals and functional requirements to fulfil the safety and, increasingly, the environmental expectations of society – which are growing ever more demanding. The vessels of the future must provide a continuous response to the needs of society, industry and global trade and be operated within a framework that encourages a safety culture beyond mere compliance with statutory requirements. This is can be achieved by giving consideration to future regimes and regulatory systems over carriage of goods by sea and ship safety.”¹

The above statement highlights the fact that vessels must continuously respond to the needs of society, industry and global trade and be operated within a framework that encourages safe carriage and protection of the environment. This can be achieved in two ways. First, it is paramount to encourage a safety culture beyond mere compliance with statutory requirements by constantly assessing the potential of emerging new technologies and innovations that help to make vessels safer. Failure to do this may lead to tremendous consequences, e.g. oil pollution, cargo damage, etc. Second, it is important to devise a regulatory framework that will evaluate and amend the law of carriage of goods by sea to keep pace with the development of shipping and trade.

It is here that the importance of seaworthiness emerges. The ocean has a volatile nature and has the capacity to overwhelm any vessel. Therefore, vessels should be furnished to withstand this potential harm in order to protect

¹ Koji Sekimizu, Secretary-General, International Maritime Organization, Future Ship Safety and Regulations, 10-11 June 2013.

cargo, the environment, and the economic purpose of the contract. It is here that the law governing the seaworthiness of vessels arises.

This Chapter seeks to provide some background to the development of seaworthiness and the different forms in which it can take. It also looks at the development of the Rotterdam Rules and the importance of how the relevant conventions are interpreted. Finally, it concludes by identifying the key questions relevant to carrying out the comparative study.

1.1 Development of the legal concept of seaworthiness

As far back as the fourteenth century,² there was no need to establish the notion of seaworthiness. The court dealt with any loss or damage to cargo on the basis that the carrier needed to take proper care of the client's cargo.³

The nineteenth century⁴ was deemed a notorious era for its spate of massive losses to human life, ships and cargo at sea. Logic dictated in the mind of judges that those who placed their property on board a vessel for the purpose of a maritime adventure should be suitably protected by the legal requirement that the vessel be seaworthy.

² *The Humber Ferryman case* (1348) 22 YB 22 Liber Assisarum N041 f.94. A.D cited in <http://www.nadr.co.uk/articles/published/shipping/Seaworthiness.pdf>, p.2; Hughes, *Casebook on Carriage of Goods by Sea*, (Oxford University Press, 1999), at p.4.

³ There was no pressing need for the concept of seaworthiness to protect the owner's interest. As the law developed, the notion of the common carrier developed whereby, in the absence of an Act of God, King's enemies and inherent vice in cargo, any liability for cargo damage was incurred by the shipowner. *Forward v Pittard* (1785) 1 TR 27; *Coggs v Bernard* (1703) Ld Raym 909.

⁴ See Wong, S., 'Seaworthiness: The influence of Maritime Law' at p.24 cited in *Fitness for Sea: An International Conference on Seaworthiness* (Newcastle University, 9-10, 1980).

As a result of this reasoning, demands for, and the importance placed upon, a notion of 'seaworthiness' germinated and flourished.⁵ An enormous body of common law established the importance of seaworthiness and implied a duty on the carrier to provide a seaworthy vessel. It was also developed by legislators who, for the general purpose of unifying the rules governing maritime law, expressly incorporated the term 'seaworthiness' into treaties, for example, the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 1924 (The Hague Rules) and its Visby Amendment of 1968.⁶ This replaced the obligation of absolute seaworthiness at common law with an obligation to exercise 'due diligence' to provide a seaworthy vessel. Furthermore, as there was a demand for amending the law in relation to the carriage of goods by sea, another convention, referred to as the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) was introduced. Subsequently, the Comité Maritime International (CMI) and the United Nations Commission on International Trade Law (UNCITRAL) has worked together to produce a new set of rules, namely the United Nations Convention on Contracts for International Carriage of Goods Wholly and Partly by Sea (Rotterdam Rules),⁷ to ensure that the law is in line with the development of the industry, i.e. with the rise of multimodal carriage and containerisation. One of the major changes regarding the obligation of seaworthiness is that the exercise of due diligence was extended to the entire voyage. Changes included the obligation to

⁵ See *Lyon v Mells* (1804) 102 E.R. 1134, where Lord Ellenborough stated that 'in every contract for the carriage of goods [by sea], it is a term of the contract on the part of the carrier...implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds forth...' at p.1137.

⁶ Hereinafter, the Hague/Hague-Visby Rules. The amendments do not change any of the obligations of seaworthiness; some of the amendments are related to the limit of liability and amount of compensation that the cargo-interest may receive.

⁷ Hereinafter, the Rotterdam Rules.

make and keep any containers supplied by the carrier fit and safe as well as some changes to the basis of liability and the burden of proving unseaworthiness with the deletion of the nautical fault exclusion.

1.2 The importance and relevance of seaworthiness

Every contract for the carriage of goods by sea or water⁸ is subject to either implied or express obligations, one of which is the obligation to provide a seaworthy ship.⁹ The obligation arises, under the Hague/Hague-Visby Rules, both before and at the beginning of the voyage and the carrier may be held liable if they fail to exercise due diligence to make the vessel seaworthy at this time. If the carrier can demonstrate either that the vessel was seaworthy or that due diligence was exercised to make the vessel seaworthy at the relevant time, he will be deemed to have discharged the obligation on him and will be able to benefit from the exceptions available to him.

The cargo-interests must, in order to establish the liability of the carrier, prove that the vessel was unseaworthy at the beginning of the voyage¹⁰ and that the loss would not have arisen but for the unseaworthiness.¹¹

The codification of good seamanship practice and knowledge has created Shipping Industry Regulations¹² in the form of conventions and codes such as

⁸ *Elof Hansson Agency v Victoria Co.* (1938) 54 T.L.R. 666, Singleton J. held that a contract of lighterage with lighterage contractors who sub-contracted with a lighterage company for the collecting of cargo from a ship was a contract of affreightment, and that a warranty of seaworthiness was therefore to be implied.

⁹ See Wilson J., *Carriage of Goods by Sea*, (2008, Pearson Education, 6th ed.), at p.9.

¹⁰ See *Minister of Food v Reardon Smith Line* [1951] 2 T.L.R. 1158.

¹¹ The cargo-interests cannot recover for loss or damage without establishing that the unseaworthiness is the cause of loss or damage, per Lord Esher M.R. in *Baumwoll v Gilchrist* [1893] 1 Q.B. 253, at p.257 and 258, approved in *Kish v Taylor* [1912] A.C. 604, at p.617. It is immaterial that other causes contributed to occasion it per Lord Wright in *Smith, Hogg and Company Limited v Black Sea and Baltic General Insurance Company Limited* [1940] A.C. 997.

¹² Hereinafter, shipping industry. Shipping industry can be defined as the rules, regulations and guidance (e.g. conventions, codes, etc.) issued by official bodies at the international or national

SOLAS and STCW, which are constantly updated. Considering the fact that these Regulations may influence (directly and/or indirectly) factors considered by the court in determining whether the vessel is seaworthy,¹³ the legal question of what constitutes a seaworthy vessel, therefore, has changed over time and will continue to change in line with trends of the shipping industry.¹⁴

Another matter that raises practical issues is the multiplicity and complexity of legal regimes governing the carriage of goods by sea specifically and by land generally; these have increased since the emergence of container carriage. Such complexity raises difficulties in relation to the imbalance between the carrier and the cargo-interests. Despite the trends that have occurred over the years in the law, originally in common law, then in the Hague/Hague-Visby Rules and now in the untested regime of the Rotterdam Rules, the latter regime has expanded the carrier's responsibility to cover the land leg of the carriage.

1.3 Definition of seaworthiness

The broad nature of the concept of 'seaworthiness' makes it difficult to comprehensively define.¹⁵

However, the definition of seaworthiness, despite the changes in the law that govern seaworthiness, has not been changed over the years and encapsulates

level concerned with or interested in the safety of shipping such as the International Maritime Organisation (IMO).

¹³ See for instance, SOLAS, Chapter V, Regulation 14: Ships' manning. It provides for the minimum sufficient and efficient manning of vessels.

¹⁴ Per Lord Sumner in *Bradley & Sons Ltd v Federal Steam Navigation Co.* (1926) 24 Ll.L.Rep. 446; (1927) 27 Ll.L.Rep. 397. He stated, prior to the Hague/Hague-Visby Rules that 'In the law of Carriage of Goods by Sea, neither seaworthiness nor due diligence is absolute, both are relative among other things to the state of knowledge and the standards of [industry] prevailing at the time.'

¹⁵ The definition of seaworthiness is regarded by all scholars as unified in meaning between the carriage of goods by sea and the law of marine insurance.

a number of different elements. It can be said that it is the fitness of the vessel that allows her to withstand the expected ordinary perils of the contemplated voyage. In *Kopitoff v Wilson*,¹⁶ the Court held that “*the ship is good, and is in a condition to perform the voyage then about to be undertaken, or, in ordinary language, is seaworthy; that is, fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage.*”¹⁷ Further, in *Virginia Carolina Chemical Co. v Norfolk and North American Steam Shipping Co.*, one of the iron armour plates, which formed the cargo, broke loose in rough weather and went through the side of the vessel, which in consequence sank. It was held that the vessel was not seaworthy in the sense of not being cargoworthy. The court stated that “*There was in every contract with regard to carriage of goods by sea an absolute warranty that the carrying vessel must, at the time of sailing with the goods, have that degree of fitness as regards both the safety of the ship and also the safe carriage of the cargo in the ship which an ordinary careful and prudent owner would require his vessel to have at the commencement of the voyage, having regard to the probable circumstances of that voyage and its nature...*”¹⁸ Indeed, the meaning of seaworthiness in practical terms differs from case to case; no vessel can at all times be fit to carry any cargo whatsoever to any part of the world. What is required of a carrier of timber in the North Atlantic in

¹⁶ *Kopitoff v Wilson* (1867) 1 Q.B.D. 377.

¹⁷ *Kopitoff v Wilson* (1867) 1 Q.B.D. 377 at p.380; *McFadden v Blue Star Line* [1905] 1 K.B. 697, cited in Carver, *Carriage by Sea*, which defined seaworthiness as “...that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it,” at p.706, per Channel J.

¹⁸ *Virginia Carolina Chemical Co. v Norfolk and North American Steam Shipping Co.* (1912) 1 K.B. 229 (C.A.). at p.243 per Kennedy L.J.

November, for instance, is quite different from the corresponding obligation facing the carrier of meat on a tropical voyage in the China Sea in June.¹⁹

Carver has introduced a benchmark test that assists carriers to determine whether their vessel is seaworthy or not, namely, 'Would a prudent owner have required that a defect should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking.'²⁰

However, a standard of repair/preparation to make the vessel seaworthy differs depending on the contemplated voyage as well as the type of cargo.²¹ 'Seaworthiness is a word of which the importance varies with the place, the voyage, the class of the ship, or even the nature of the cargo.'²² A repair may be held good when encountering a peril of a particular voyage²³ but it might not be held adequate for another voyage and the vessel may be regarded as unseaworthy.²⁴ Additionally, the nature of the cargo is a factor to be considered

¹⁹ *Burges v Wickham* (1863) 3 B & S 669; *F. C. Bradley & Sons Ltd v Federal Steam Navigation Co.* (1926) 24 Ll. L. Rep. 446.

²⁰ The test was first introduced by Carver on Carriage of Goods, 18th ed. The test then was applied to many cases, e.g. *McFadden v Blue Star Line* [1905] 1 K.B. 697, at 703; *M.D.C. Ltd v N.V. Zeevaart Maatschappij* [1962] 1 Lloyd's Rep. 180.

²¹ *Stanton v Richardson* (1875) L.R. 9 C.P. 390. "The implied undertaking is that the ship shall, when the voyage begins, be seaworthy for that particular voyage and for the cargo carried" at p.395; Ivamy, E. R., *Carriage of Goods by Sea*, (Butterworth, 13th ed, 1989) at p.21.

²² *Foley v Tabor* (1861) 2 F & F 663 at p.671, per Erle CJ.

²³ Some particular voyages at a particular time of the year correspondingly require a higher standard of seaworthiness. In *Virginia Carolina Chemical Co. v Norfolk and North American Steam Shipping Co. Kennedy* (1912) 1 K.B. 229, Buckley LJ stated that 'the carrying vessel must, at the time of sailing with the goods, have that degree of fitness as regards both the safety of the ship and also the safe carriage of the cargo in the ship which an ordinarily careful and prudent owner would require his vessel to have at the commencement of the voyage, having regard to the probable circumstances of that voyage and its nature' at pp.243-244.

²⁴ For the purposes of clarity and simplicity, the term 'seaworthy' is used in this thesis to denote the condition of a vessel as being seaworthy. Seaworthiness is used to denote the legal requirement to furnish a seaworthy vessel. The term 'unseaworthiness' is used to denote a breach of the legal duty to furnish a seaworthy vessel and unseaworthy represents the condition of the vessel.

when assessing the seaworthiness of a vessel.²⁵ The above demonstrates that there is no universal standard of seaworthiness. The standards defining seaworthiness are technical and complicated, hence they must be considered in this study to assist with the comparison of the duty under the different regimes.

1.4 The facets of the vessel's seaworthiness

The vessel must be in such a state at the start of the voyage to perform the contract of carriage safely with emphasis on the vessel itself and the particular cargo to be carried on the voyage. Seaworthiness of the vessel encompasses two types of fitness: a) the fitness of the vessel to withstand the perils of the sea (meaning sea and port); and b) her capability to carry and deliver the cargo safely to its contemplated destination(s).

1.4.1 Physical seaworthiness

Seaworthiness refers to the good order of the hull of the vessel, which encompasses keeping the bulkheads, plating and masts in a condition that is fit

²⁵ *Daniels v Harris* (1877) 2 App Cas 72, 77. The type of cargo loaded on board, for example, may restrict the vessel from loading other types of cargoes. In *Stanton v Richardson* (1871-1872) L.R. 7 C.P. 421. A cargo of wet sugar rendered the vessel unseaworthy. The carrier was given the choice to select between a range of cargoes. The carrier selected the wet sugar. The ship's pump could not handle the amount of moisture in the sugar. See also *The Benlawers* [1989] 2 Lloyd's Rep. 51. "*The words 'any permissible cargo' are there as part of the contract and the onions were a permissible cargo. It is not part of the shipowner's case that there was any breach of the charter-party on the part of the time charterers, nor is it a part of their case that the onions were anything other than a legitimate cargo. The position therefore is that if it is a permitted cargo then the shipowners must be prepared to do whatever is necessary to carry the cargo safely.... If the owners had wanted to make special provision for a cargo of onions or if they were to advance a case that it was exceptional or unusual cargo, then they might have done so. But the cargo of onions was not such a cargo and there was no special provision in this charter-party. If owners wish a different result, they must limit the cargoes which may be carried under the charter-party. If they expressly exclude such cargoes then there will be no risk of their having any liability to cargo-interests in respect of such cargoes and, indeed, shipping such a cargo will be a breach of the charter-party.*" per Mr. Justice Hobhouse, pp.60-61.

for the voyage taking into consideration the type of the vessel,²⁶ the navigable water in which the vessel is sailing,²⁷ the time of year²⁸ and the knowledge available at the time of the voyage.²⁹ The vessel's structural integrity (hull) must be sufficiently strong to endure the likely weather.³⁰ Her hull plating,³¹ hatches

²⁶ See *Burges v Wickham* (1863) 3 B & S 669. A vessel built for use in a river carried out some modifications to strengthen and prepare the vessel for ordinary sea perils expected in her voyage from the United Kingdom to India. The insurers were made aware of the original construction and the modifications that had taken place. They accepted the additional risk of a river vessel carrying out an ocean voyage in exchange for an extra premium. She could not withstand the encountered expected perils of the ocean and consequently she was lost. The underwriters unsuccessfully sought to avoid liability when they contested that the vessel was unseaworthy.

²⁷ See *The Quebec Marine Insurance Company v The Commercial Bank of Canada* (1869-1871) L.R. 3 P.C. 234. The vessel was insured for a voyage of sea and river. Her boiler had a defect that was not apparent in the river leg, but once the vessel sailed at sea the defect became apparent and the vessel had to be put in for a repair. The court held that the vessel was unseaworthy to sail in salt water. The insurer was not liable to pay the assured shipowner because the shipowner breached its implied obligation by virtue of s.39 of the Marine Insurance Act. See also *Moore v Lunn* (1923) 15 Ll.L. Rep. 155 and *Burges v Wicham* (1863) 3 B & S 669.

²⁸ The vessel may be seaworthy for a trip to be made in the summer but unseaworthy for a winter voyage: See *Daniel v Harris* (1874-1875) L.R. 10 C.P. 1, an insurance case where the vessel sailed in February with agreed deck cargo. The vessel encountered rough seas, which were not extraordinary conditions and should have been anticipated at that time of year. The vessel could not survive without jettisoning the deck cargo. The court held that the vessel was unseaworthy to carry deck cargo during that time of the year. See also *Moore v Lunn* (1923) 15 Ll.L. Rep. 155, where Lord Justice Bankes stated: "*That was the state in which this vessel started on a voyage in midwinter across the North Atlantic with an unlashd deck cargo of logs. In my opinion, the learned Judge was quite right in coming to the conclusion that at the time the vessel started she was in fact unseaworthy by reason of the state in which the captain and the first engineer were,*" p.156.

²⁹ The vessel is not required to be fitted with the latest technology as long as it is not compulsory by safety conventions, e.g. SOLAS. See *M.D.C. v N. V. Zeewaart Maatschappij* [1962] 1 Lloyd's Rep. 180. A cargo of potatoes arrived damaged at the destination due to lack of ventilation. This resulted when the carrier had to close the hatches to protect the cargo from rain. The owner claimed that the vessel was unseaworthy as it did not have a ventilation system. The court held that the vessel was seaworthy and the damage suffered was not beyond what should be expected in such a voyage. See also *Bradley v Federal Steam Navigation* (1926) 24 Ll.L. Rep. 446.

³⁰ In *The Christel Vinnen* [1924] P 208; (1924) 19 Ll.L. Rep. 272, where a missing rivet from the vessel's hull allowed seawater to leak into the hull and damage the cargo, Lord Scrutton stated: "*...the rivet was a defective rivet when the voyage started, and that, therefore, made the ship unseaworthy*", p.212.

³¹ A single crack in the hull plating rendered the vessel unseaworthy. See *Huilever SA v The Otho* [1943] A.M.C. 210.

and portholes,³² doors and skylights must be adequately watertight to protect the stability of the vessel from ingress of water. The carrier should ensure that his vessel is supplied with the necessary equipment; for example, radar and GPS required by the classification society and by safety conventions, i.e. SOLAS.³³

1.4.2 Supply of equipment

It is also necessary for the vessel to have her engines,³⁴ documentation,³⁵ navigation equipment,³⁶ steering gear,³⁷ anchors,³⁸ boilers,³⁹ generators,⁴⁰ and

³² See *Steel v State Line* (1877) 3 App Cas 72, pp.90-91. The court found that the physical seaworthiness of the vessel was not fulfilled when one of the deck portholes was insufficiently fastened. During the voyage, water entered through the porthole and damaged the cargo of wheat. Portholes may be opened and closed in normal course depending on the practical need. Those are not practices that would render the hull to be physically unseaworthy. *Gilroy v Price* [1893] A.C. 56, p.64; also per Lord Blackburn in *Steel v State Line* (1877) 3 App Cas 72, p.90; *International Packers v Ocean S.S. Co.* [1955] 2 Lloyd's Rep. 218.

³³ See *Bradley v Federal Steam Navigation* (1926) 24 Ll.L. Rep. 446, pp.454-455; *Virginia Co. v Norfolk Shipping Co.*, 17 Com Cas 277, p.278.

³⁴ See *Eridania SpA & Others v Oetker & others (The Fjord Wind)* [2000] 2 Lloyds Rep 191. The vessel had constant surveys by experts but she did not complete her voyage. The owners chose not to adduce evidence from the surveyor with regards to the investigations that had been carried out and due to a failure in machinery; the owner was liable for any loss caused by unseaworthiness.

³⁵ The courts have long recognised that a vessel must be provided with certain documentation and certification to enable her to perform her duty. This requirement is merely a constituent of a broader obligation that the vessel is 'legally fit' to perform her duty under the seaworthiness aspect. See *Sea Glory Maritime Co., Swedish Management Co. SA v Al Sagr National Insurance Co. (The Nancy)* [2013] EWHC 2116 (Comm), the court stated that the warranty in an insurance policy such as 'Vessels ISM Compliant' is a warranty of compliance with the ISM Code at the inception of the policy and throughout the period of the policy. However, it was indicated that a certificate of ISM compliance does not represent conclusive evidence of compliance, para.212 per Mr Justice Blair. Another good illustration is stated by Cook J in *The Elli and The Frixos Golden Fleece Maritime Inc and Pontian Shipping SA v ST Shipping & Transport Inc* [2008] 2 Lloyd's Rep. 224, approving the authority of *Alfred C Roeper v Tossa Marine Co. Ltd (The Derby)* [1985] 2 Lloyd's Rep. 325, p.331. He stated that: 'A vessel which is "legally fit" to carry a permitted cargo... cannot properly be described as being "in every way fit" to do so. Nor can a vessel be "in every way fit for the service" if she is not legally fit to carry cargo... which is part of the specified service... the words "in every way"... cannot be restricted to the vessel's physical state... legal fitness is just as important as physical fitness and the line between the two is not always easy to draw, especially where the legal incapacity results from the physical characteristics of the vessel,' pp.272-273. For certification seaworthiness, see *Cheikh Boutros Selim El-Khoury and Others v Ceylon Shipping Lines Ltd (The Madeleine)* [1967] 2 Lloyd's Rep. 224, where the vessel did not carry a deratting certificate which was required by

auxiliaries⁴¹ in good working order before and at the beginning of the voyage.⁴²

Fire-fighting equipment is essential for the seaworthiness of the vessel; their deficiency to work constitutes unseaworthiness.⁴³ The supply of sufficient spare parts and provisions is considered part of the due diligence requirement, which

Port state control and, for that reason, the port authority refused entry to the vessel in order to discharge the cargo. The vessel arranged to be delivered to the charterer by May 10th, but the certificate of deratting would not be granted until May 12th. The charterer refused the charter because the vessel was not delivered ready prior to the cancellation date. The Court held that the carrier failed to deliver the vessel in a seaworthy condition by the delivery date.

³⁶ The vessel's compass has to be reliable: *Paterson Steamships Ltd v Robin Hood Mills* (1937) 58 Ll. L. R. Rep. 33; along with a fog whistle, *The Niagara* [1898] 84 Fed Rep 902; and navigation charts must be adequate, *Rey Banano del Pacifico CA v Transportes Navieros Ecuatorianos SpA (The Isla Fernandina)* [2000] 2 Lloyd's Rep. 15 (the vessel was found unseaworthy due to inadequate charts and navigational aids). Radio aids must also be adequate: *The Eurasina* [2002] EWCH 118 (comm); [2002] 1 Lloyd's Rep. 719. In this case, small hand-held communication equipment, which establishes communications between the master and the rest of the crew (e.g. a walkie-talkie) could be a factor rendering the ship unseaworthy.

³⁷ *The Assunzione (No.2)* [1956] 2 Lloyd's Rep. 468; *Haracopos v Mountain* (1934) 49 Ll.L. Rep. 267.

³⁸ Lord Justice Upjohn in the Court of Appeal pointed out in *Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd*, that: '...if proper medical supplies or two anchors are not on board at the time of sailing, the owners are in breach of the seaworthiness stipulation.' (1962) 2 Q.B. 26, p.62.

³⁹ *Quebec Marine Insurance Co. v Commercial Bank of Canada* (1870) L.R. 3 P.C. 234. The owner was held liable for unseaworthiness as the vessel's boilers were defective. If the boilers filled with muddy waters, which they will eventually, the result would be deposited mud, which would clog the steam pipes and render the vessel unseaworthy with defected boilers.

⁴⁰ See *Project Asia Line Inc of Delaware & United Shipping Services Ltd v Andrew Shone (The Pride of Donegal)* [2002] 1 Lloyd's Rep. 659, where generator failure might have left the vessel without power during the course of the voyage. Another reason in this case is that the main engine turbocharger was corroded which prevented power to be generated by the main engine.

⁴¹ *Wilkie v Geddes* (1815) 3 Dow 57. See also *CHS Inc Iberica SL and Another v Far East Marine SA (The Devon)* [2012] EWHC 3747 (QBD)(Comm). The vessel, after three hours of sailing, was unseaworthy at the commencement of the voyage by reason of the condition of the seawater cooling system.

⁴² See also *Hong Kong Fir Shipping Co. v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26.

⁴³ *Manifest Shipping Co. Ltd v Uni-Polaris Insurance Co. Ltd (The Star Sea)* [2001] UKHL 1; [2003] 1 A.C. 469; *Asbestos Corp Ltd v Compagnie de Navigation Fraissinet et Cypri en Fabre* [1972] A.M.C. 2581; *Papera Traders Co. Ltd v Hyundai Merchant Marine Co. Ltd (The Eurasian Dream)* [2002] EWHC 118; [2002] 1 Lloyd's Rep. 719.

a carrier has to exercise to make his vessel seaworthy.⁴⁴ As a result, the vessel will be rendered unseaworthy if she is supplied with unsuitable spare parts.⁴⁵

1.4.3 Crew seaworthiness⁴⁶

The seaworthiness of a vessel also embraces the satisfactoriness of manning levels in terms of competence, adequacy of number and their management.⁴⁷

For instance, the vessel is rendered unseaworthy if she sails without a competent crew,⁴⁸ which is adequate in number for the voyage.⁴⁹

⁴⁴ *Project Asia Line Inc v Shone (The Pride of Donegal)* [2002] EWHC 24; [2002] 1 Lloyd's Rep. 659.

⁴⁵ *Guinomar of Conakry v Samsung Fire & Marine Insurance Co. Ltd (The Kamsar Voyager)* [2002] 2 Lloyd's Rep. 57. This aspect of seaworthiness is believed to be significant for two reasons. First, it is necessary as it contributes towards the seaworthiness of the vessel's machinery. Some of the original spare parts come with the vessel from the building yard in case the running machinery needs to be replaced due to malfunctioning, especially if the vessel has not yet commenced her voyage, i.e. a default in a part of the generator which supplies the main engine with power. This will constitute unseaworthiness before and at the commencement of the voyage. Additionally, if the vessel's engine breaks down en route to the discharge port, a replacement will be required to repair the defective part of the engine. Without essential spares, the vessel will be rendered as an unseaworthy one. Second, apart from mechanical failures, the need for maintenance is important. By using such spare parts, the ones normally in use can be maintained; without the necessary spare parts, the vessel would be rendered unseaworthy even at the commencement of the voyage. The obligation is not restricted to having a vessel fitted with sound working machineries. However, having an adequate number of spares to support everyday operations is imperative and not doing so would in turn make the vessel unseaworthy.

⁴⁶ For further information on the subject, see White R., 'The Human Factor in Unseaworthiness Claims' [1996] LMCLQ, p. 24.

⁴⁷ *Standard Oil Company v Line Steamers* [1924] A.C. 100; (1923-24) 17 Ll. L. Rep. 120; 1924 S.C. (H.L.) 1; 1924 S.L.T. 20. The owner had failed to communicate to the master the builder's instructions in respect of the way in which the ballast tanks were to be filled. In his ignorance, the master ordered the crew to pump out the tanks shortly after leaving port with the result that the vessel capsized and sank.

⁴⁸ *Shore v Bentall* 172 E.R. 303; (1827) 3 Car & P. 16; *Tait v Levi* (1811) 14 East 81; In *Robin Hood Flour Mills Ltd v N. M. Paterson & Sons Ltd (The Farrandoc)* [1967] 1 Lloyd's Rep. 232 (Quebec), the vessel was unseaworthy, *inter alia*, as the engineer was incompetent for not being familiar with this particular vessel; *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [1995] 1 Lloyd's Rep. 651, Q.B., affirmed on this point [1997] 1 Lloyd's Rep 360 (C.A.), where the court held in the context of s.39(5) of the Marine Insurance Act 1960 that the owner's failure to ensure the master was familiar with the operation of the vessel's CO₂ system rendered the vessel unseaworthy at the start of the voyage.

⁴⁹ *Burnard & Alger Ltd v Player & Co.* (1928) 31 Ll.L. Rep. 281. 'The vessel was rendered unseaworthy for the reason that a member of the crew had left the vessel and she had sailed without a substituted officer'; *Clifford v Hunter* (1827) Mood & M 103; *Tait v Levi* (1811) 14 East 81; *Forshaw v Chabert* (1821) 3 Brod & Bing 158, that the vessel, in order for it to be seaworthy, must have a sufficient number of crew for the whole voyage at the commencement thereof.

1.4.4 Bunker seaworthiness

The carrier also has the duty to supply the vessel with bunkers and other necessary fuels. In older vessels, i.e. steamships, coal was used as bunkers whereas today vessels use heavy diesel oil instead. Bunkers have to be sufficient in quantity so that a vessel can reach the chartered port of destination and also have a suitable reserve margin. Should this not be the case, the carrier would be considered in breach of his duty to provide a seaworthy vessel.⁵⁰ The quality of the supplied bunkers should be in accordance with the recommended type of fuel by the engine manufacturer. The vessel may be unseaworthy and the owner liable if he provides bunkers that will cause the engine to malfunction, which may in turn cause damage, e.g., to perishable, cargo.⁵¹

⁵⁰ *Thin v Richards & Co.* [1892] 2 Q.B. 141. See *Northumbrian Shipping Co. Ltd v E. Timm and Son Ltd* [1939] A.C. 397, where the vessel had sailed with insufficient bunkers from Vancouver to reach The Virgin Islands. She could have taken bunkers at Colon on her transit of the Panama Canal; however, she did not do so and was forced to deviate to Jamaica for refuelling. The House of Lords held that the vessel was unseaworthy on leaving Vancouver because of the fact that she sailed from there with no attention to bunkering in Colon; see also *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep. 177. The *Mighty Deliver* tug was contracted to tow a drilling rig across the South Atlantic. The tug ran out of fuel, whereupon the tow was released and the rig drifted away from the tug. Total damage occurred to the rig. The owner of the tug was found to be in breach of his duty to exercise due diligence to tender the tug at the commencement of the voyage in a seaworthy condition and in all aspects ready to perform the voyage. However, the tug owner was protected from liability by cl.18 of MOA (exemption clause).

⁵¹ *Nippon Yusen Kaisha v Alltrans* (20 Feb. 1984, unreported). The carrier was liable for unseaworthiness on the ground that he failed to exercise due diligence in not supplying proper bunker quality. Cited in Terence C. et al., *Time Charters*, (LLP, 6th ed., 2008), para.12.8. Some charterparties expressly require the carrier/charterer to supply bunkers of a quality suitable for the ship's engines and auxiliaries that conform to agreed specifications, failing which the owners may claim for damage to the engines or auxiliaries and will be protected against claims for reduced speed, increased consumption, loss of time or any other consequences. See, for example, Clause 9(b) of the 1993 revision of the New York Produce Exchange form. *Owners of Cargo Lately Laden on Board The Makedonia v Owners of The Makedonia (The Makedonia)* [1962] 1 Lloyd's Rep. 316, bunker fuel for the voyage became contaminated despite the adequate quantity loaded. Some of the cargo needed to be used as fuel, while other cargo was to be jettisoned as she became unable to continue her voyage under her own power. The court held that the contamination was due to the lack of proper plans for bunkering and the absence of a competent crew which resulted in the unseaworthiness of the vessel. In *The Kriti Rex* [1996] 2 Lloyd's Rep. 171, the poor quality lubricant engine oil has rendered the vessel unseaworthy.

It is worth mentioning that the duty of seaworthiness operates at different points in the contract of carriage (doctrine of stages),⁵² which is not applicable under the Hague/Hague-Visby Rules.⁵³ Yet, for long voyages, the vessel will need to bunker at an intermediate port as part of exercising due diligence to provide a seaworthy vessel. Therefore, bunkering in stages is admissible under the current law.⁵⁴

1.4.5 Cargoworthiness

The carrier is required to, along with providing a physically fit vessel, crew and correct documentation, provide a vessel fit to receive the intended cargo and deliver it to the discharge port safely.⁵⁵ This amounts to a warranty *“that at the time the goods are put on board [the vessel] is fit to receive them and to encounter the ordinary perils that are likely to arise during the loading stage”*.⁵⁶ Therefore, the carrier, in addition to providing a seaworthy vessel in regard to its hull, crew, equipment, bunker and documentation, should provide a cargoworthy vessel. In other words, it is the capability of the vessel in being ‘suitable to carry the contract cargo’,⁵⁷ and to deliver it safely to the final

⁵² Further discussion on this point will follow; see para. 2.14.1, ‘The effect of the extension of the obligation and the application of the duty to “make” the vessel seaworthy “before and at the beginning of the voyage”.’

⁵³ In *The Makedonia* [1962] 1 Lloyd’s Rep. 316, Hewson J referred to the word ‘voyage’ in the Hague/Hague-Visby Rules stating that: *“I see no obligation to read into the word “voyage” a doctrine of stages, but a necessity to define the word itself. The word does not appear in the earlier Canadian Act of 1910. “Voyage” in this context means what it has always meant: the contractual voyage from the port of loading to the port of discharge as declared in the appropriate bill of lading*”, at p. 329-330. Lord Justice Aikens, Richard Lord, Michael Bools, Bills of Lading (2006, 1st ed.), state that: *“This doctrine [of stages] is largely of historical interest only. It is generally irrelevant where the Hague Rules apply,”* para. 10.93; Julian C. et al., *Voyage Charters*, (2007, 3rd ed.), para. 85.99.

⁵⁴ First, the carrier must have adequate and sufficient bunkers to reach the intermediate port. Secondly, the carrier must also have arranged for the same to reach its destination of the discharge port, pursuant to the contractual destination. See *The Makedonia* [1962] P 190.

⁵⁵ *Elder, Dempster and Company Limited, and Others Appellants v Paterson, Zochonis and Company, Limited and Others* [1924] A.C. 522, Viscount Cave, at p.530.

⁵⁶ *McFadden v Blue Star Line* [1905] 1 K.B. 697. Channell J, at p.704.

⁵⁷ *The Aquacharm* [1982] 1 Lloyd’s Rep. 7 at p.11, by Griffiths LJ.

destination. In doing so, the vessel should be adequately fitted with equipment and tackle,⁵⁸ which should be properly maintained in order to prevent damage to the cargo.⁵⁹ Further, cargo holds should be, before receiving cargo, fumigated and clean and free from any dirt or substances that could contaminate and damage the cargo.⁶⁰ This is required under common law and under the Hague/Hague-Visby Rules where the carrier must exercise due diligence to make the holds of the vessel fit and safe for receipt and preservation of cargo.⁶¹ The duty to provide a vessel fit to carry the cargo (i.e. 'cargoworthy') is part of the duty to provide a seaworthy vessel. It is not, therefore, necessary to expressly include the duty to provide a cargoworthy vessel in the contract.⁶²

⁵⁸ *Stanton v Richardson* [1895] L.R.9 C.P. 390. It was held that the ship was unseaworthy because the carrier failed to install a sufficient number of pumps in order to drain the surplus water from the wet sugar. Some cargoes require special arrangement, which if not carried out would render the vessel uncargoworthy. For instance, in *Queensland National Bank Limited v Peninsular and Oriental Steam Navigation Company* [1898] 1 Q.B. 567, the carrier contracted to carry gold. The vessel was delivered without the special arrangement in a way to be 'constructed as reasonably fit to resist thieves'. Theft of gold rendered the vessel uncargoworthy.

⁵⁹ In *Maori King v Hughes* [1895] 2 Q.B. 550, a defect in the refrigeration system rendered the vessel unseaworthy.

⁶⁰ *The Tres Flores* [1973] 2 Lloyd's Rep 247; *Cheikh Boutros Selim El-Khoury and Others v Ceylon Shipping Lines, Ltd. (The Madeleine)* [1967] 2 Lloyd's Rep. 224; *Tattersall v National Steamship Co.* (1884) 12 QBD 297.

⁶¹ *Owners of the Cargo on the ships Maori King v Hughes* (1895) 2 Q.B. 550 (C.A.). The ship was carrying frozen mutton when the refrigeration system broken down. Cargo had to be sold at different ports at a loss. The defendant relied on a clause in the bill of lading when the plaintiffs argued that there was an implied warranty of fitness of the refrigeration system at the commencement of the voyage. The court ruled in favour of the claimant finding the vessel unseaworthy. In *Queensland National Bank v Peninsular and Oriental Steam Navigation Co.* (1898) 1 Q.B. 567 (C.A.), a valuable cargo was stolen from the vessel. The vessel was found unseaworthy because the vessel was not fitted with bullion rooms for safe carriage. *Empresa Cubana Importadora de Alimentos Alimport v Lasmos Shipping Co. SA (The Good Friend)* [1984] 2 Lloyd's Rep 586 (Hague/Hague-Visby Rules).

⁶² *Steel et al. v The State Line Steamship Company* (1877-78) L.R. 3 App. Cas. 72. Lord Blackburn stated that: "I take it my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, is generally expressed by saying that it shall be seaworthy..."

It is important to bear in mind that the ability of a vessel to carry cargo and deliver it safely to the port of destination is a facet of seaworthiness. A vessel may be rendered uncargoworthy⁶³ even if the other aspects of seaworthiness (crew, documentation, equipment, bunker and hull) are fulfilled.⁶⁴

- **Bad stowage and seaworthiness**

As mentioned above, uncargoworthiness can arise from the vessel's inability to receive a particular cargo in the first place or, alternatively, from a defect in the cargo holds, e.g. an unfit refrigeration system or unclean cargo holds, which occurs before loading or before the beginning of the voyage, such that the cargo arrives at its destination damaged. On the other hand, bad stowage, in spite of the vessel being seaworthy with regards to its physical fitness, manning, documentation and its ability to receive the contracted cargo, e.g. cargoworthy, can render the vessel unseaworthy if the stowage is such that it endangers the safety of the vessel to carry out the intended voyage.⁶⁵

⁶³ *Read v Page* [1927] 1 K.B. 743, Scrutton L.J. stated that: "A ship may be unfit to carry the contemplated cargo, because, for instance, she has insufficient means of ventilation, and yet be quite fit to make the contemplated voyage, as a ship", at p.754; *Madras Electric Supply Company v P. & O. Steam Navigation Company*, (1923) 16 Ll. L. Rep. 240.

⁶⁴ It has been concluded that: "A cargoworthy vessel can be unseaworthy, but an uncargoworthy vessel can never be seaworthy, as this is part of the requirement and one of the fundamentals in the concept of seaworthiness." See Sofia Bengtsson, 'The Carriage of Goods by Sea Conventions - A comparative study of seaworthiness and the list of exclusions' (Master's dissertation, Spring 2010, Lund University), cited in <http://www.ebookszip.com/pdf/the-carriage-of-goods-by-sea-conventions-lund-university-176887.pdf>.

⁶⁵ The court in *Kopitoff v Wilson* (1876) 1 Q.B.D. 377 established a test for drawing a distinction between unseaworthiness and bad stowage. In this case, heavy armoured plates had not been adequately lashed. During bad weather, the vessel encountered heavy rolling which caused the lashing of the armoured plates to snap and caused them to break through the side of the vessel. The vessel, as a result, sank. Cf. *The Thorsa* [1916] P. 257, where a cargo of chocolate was carried adjacent to Gorgonzola cheese. The ventilation was closed to protect the cargo from heavy seas. The court found the vessel not to be unseaworthy for the reason that the bad stowage did not endanger the safety of the vessel and caused damage only to the cargo. As per Bankes LJ, the owner was protected as the loss fell within the exception which was unambiguous, p.266.

One should be aware of the distinction between bad stowage that endangers the safety of the vessel and bad stowage that will only cause damage to the cargo without endangering the safety of the vessel. The former would render the vessel unseaworthy but the latter would not.⁶⁶

In *Elder, Dempster & Co Ltd v Paterson Zochonis & Co. Ltd*,⁶⁷ a vessel was carrying palm oil casks stowed beneath palm kernel bags. As a result, the casks were crushed and the cargo was damaged on arrival because of the weight of the sacks on the casks stored directly above them without a 'tween deck'. The House of Lords concluded that the ship was, at the time of shipment, structurally fit to receive and carry cargo without damage. Even without the presence of a tween deck the vessel was seaworthy.

The House of Lords went on to differentiate between bad stowage that caused unseaworthiness and bad stowage that merely caused damage to the cargo. Bad stowage amounts to unseaworthiness only when it affects the physical safety of the vessel. For example, in the *Elder Dempster* case, if the casks had been stored in a way that could break the cargo holds and affect the safety of the vessel thereby sinking the vessel, the vessel would have been rendered unseaworthy due to the bad stowage.⁶⁸

On the other hand, where bad stowage merely damages cargo without affecting the safety of the vessel, e.g. uncargoworthy, the vessel remains seaworthy.⁶⁹

⁶⁶ See Baughen, S. 'Bad stowage or unseaworthiness?', (2007) LMCLQ, 1, at p.5.

⁶⁷ (1924) A.C. 522.

⁶⁸ *Elder, Dempster and Company, Limited, and Others Appellants v Paterson, Zochonis and Company, Limited* [1924] A.C. 522. Lord Sumner stated that: "Bad stowage, which endangers the safety of the ship, may amount to unseaworthiness, of course, but bad stowage, which affects nothing but the cargo damaged by it, is bad stowage and nothing more, and still leaves the ship seaworthy for the adventure, even though the adventure be the carrying of that cargo", at p.561-562.

⁶⁹ *Actis Co. Ltd v The Sanko Steamship Co. Ltd (The Aquacharm)* [1982] 1 Lloyd's Rep. 7. The vessel was refused passage through the Panama Canal and was delayed for 9 days due to being overloaded with a cargo of coal. The cargo owner claimed that the vessel was unseaworthy but the court ruled that the delay was due to the bad stowage of the cargo rather than unseaworthiness, as the vessel was able to sail safely in the open seas.

1.5 The CMI's Work on the Rotterdam Rules⁷⁰

At the end of the twentieth century, the law governing the carriage of goods by sea, as applied and developed in conjunction with several international conventions and unique regional and national laws, was widely criticised as being unsatisfactory.⁷¹ The Hague-Visby Rules provided the dominant international legal regime but some major commercial nations (such as the United States and China) were not Parties to the Hague-Visby Rules. The Hamburg Rules, being the product of a political process in which a majority of those negotiating the convention were more concerned with achieving political goals rather than meeting the commercial industry's needs, made the regime less modern and thus it never achieved widespread acceptance, because the liability regime and the general allocation of the burden of proof as set out in Article 5(1) requires the carrier to prove that he and his servant or agents took all measures that could reasonably be required to avoid occurrence and its consequences.⁷² The drafters of the Rotterdam Rules sought to extend and modernise the existing rules relating to contracts of carriage by sea.⁷³ The aim of the Rotterdam Rules was to replace the Hague/Hague-Visby Rules and the Hamburg Rules. The Rotterdam Rules were prepared over a 10-year period by

⁷⁰ For further reading, see Chapter One of Michael Sturley, F., Fujita, T. and van der Ziel, G., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by sea*, (Thomson Reuters, 2010), pp.1-21.

⁷¹ See Diamond, A., 'The Hague-Visby Rules' (1978) LMCLQ, 225, at p.255.

⁷² It is outside the scope of this study to discuss the Hamburg Rules. However, it is important to note that without any legislative guidance in respect of the obligations of the carrier and the standard of care required, the interpretation and application of this provision, insofar as the liability of the carrier is concerned, would be considerably difficult and international uniformity (which is one purpose of having an international regime) would never be achieved.

⁷³ The Commission (UNCITRAL/CMI) noted that the "*existing national laws and international conventions left significant gaps regarding issues such as the functioning of the bills of lading and seaway bills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and to the legal position of the entities that provided financing to a party to the contract of carriage.*" See Report of the United Nations Commission on International Trade Law, 34th Session, U.N. GAOR, 51st Sess., Supp. No. 17, Annex I, U.N. doc. No. A/51/17 (1996). Reprinted in 1996 CMI Yearbook, p.354, para. 210.

intergovernmental parties,⁷⁴ the CMI and UNCITRAL. Additional input⁷⁵ was received from NGOs and INGOs.⁷⁶ The primary work of the CMI was finished in November 2001 and the draft of a new convention was approved.⁷⁷ The work was then handed over to UNCITRAL where the process of finalising the Rotterdam Rules was started.⁷⁸

The final session of the Working Group took place in Vienna, January 2008, where the draft was submitted to UNCITRAL.⁷⁹ The Rotterdam Rules were adopted by the General Assembly of the UN by Resolution 3/122, which was passed on the 11th December 2008.

It should be noted that this study does not cover the duty under the common law or any of the other obligations on the carrier imposed by such conventions. However, due to the door-to-door scope of the Rotterdam Rules, the effect of other inland transport conventions, for example CMNI⁸⁰ and CMR⁸¹ with regard to the seaworthiness obligation may be considered.

⁷⁴ Work was shared between the UNCITRAL Secretariat and the CMI in soliciting views of the sectors involved in the international carriage of goods and in analysing that information. All members of the CMI were invited as well as the International Chamber of Commerce (ICC), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS), the Baltic and International Maritime Council (BIMCO), the International Union of Marine Insurance (IUMI), and the International Group of P&I Clubs.

⁷⁵ They are: CMI, UNCTAD, UNECE, ICC, IUMI, FIATA, ICS, BIMCO, International Group of P&I Clubs, IAPH, European Commission, Association of American Railroads, OTIF, European Shipper's Council, IRU, IMMTA, and the World Maritime University.

⁷⁶ Bear, S., 'Liability regimes: where we are, how we got there and where we are going.' [2002] LMCLQ, 306, at p.306-307.

⁷⁷ The CMI sent out questionnaires in May 1999 to be answered by their national associations. In this work, liability was asked to be included. Thus, issues of liability were included in the ICS terms of reference when it was established in November 1999 and UNCITRAL at its 34th Session in 2001.

⁷⁸ Important issues for UNCITRAL were that their work should take existing conventions into account and seek to establish a balance between the interests of carriers and shippers. See Lannan, K., *Overview of the Convention: The UNCITRAL Perspective*, CMI Yearbook 2009, p.274.

⁷⁹ Sturley, M. F., 'Transport law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam rules' (2008) 14 *JIML*, p.475.

⁸⁰ The Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI).

⁸¹ Convention on the Contract for the International Carriage of Goods by Road (CMR) 1956.

Technological developments that promote safety at sea are now codified and governed by Shipping Industry Regulations and by the International Maritime Organization (IMO).⁸² Such regulations may have a direct and/or indirect effect on seaworthiness and thus should, at least to a limited extent, ascertain the standard of seaworthiness.

English Law has had a big input on the development of the duty to exercise due diligence to make the vessel seaworthy. In order to properly consider the nature of the duty under both the existing and new regimes, it is important to show the method of research in relation to the obligation of seaworthiness.

1.6 The methodology of the thesis

This is a study of the duty to exercise due diligence to provide a seaworthy vessel under English law. At the time of writing, the Hague-Visby Rules apply under English law and, therefore, this thesis proceeds on the basis that the relevant sections of these Rules, where applicable, represent the aspects of a contract of carriage by sea relating to unseaworthiness. Where the interpretation of the Rules is approached differently by other jurisdictions, the nature of the duty of seaworthiness can be weighted differently. For this reason, it is worth considering the application of foreign case law to the interpretation of the obligation to exercise due diligence to provide a seaworthy vessel. This approach will similarly be used when examining the obligation of exercising due diligence, albeit with different parameters, under the Rotterdam Rules.

⁸² For further information regarding the development of IMO Conventions and their relevance to seaworthiness, see Aladwani, T., 'The effect of shipping standards on the charterparty obligation of seaworthiness', a paper presented at the 7th European Colloquium on Maritime Law Research, 'Contracts in Shipping: Flexibility, Foreseeability, Reasonableness', held in Palermo, Italy (27th-28th September 2012), pp.1-2. Published in *Marlus* (2013) nr. 242, pp. 256-298..

Another main source of this thesis has been the *travaux préparatoires* of the Rotterdam Rules, the preparatory sessions of UNCITRAL Working Group III and sessions of the Commissions.⁸³

To this end, it would be important to point out how the English courts take into account the approach of other countries when interpreting the Hague/Hague-Visby Rules. This will also answer whether the court is ready to deliberate the use of the *travaux préparatoires*.

1.6.1 Interpretation of the International Carriage Rules

This study will analyse the obligation to exercise due diligence in the Hague/Hague-Visby Rules and the Rotterdam Rules, both of which are international sea-carriage conventions. In order to achieve this purpose, it is essential to refer to the pre-convention English law authorities on this issue as well as the relatively new approach,⁸⁴ which includes the *travaux*, foreign decisions and commentaries, as adopted by the English courts to assist in understanding or addressing seaworthiness-related disputes.

⁸³ Related documents are available online at: http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_travaux.html.

⁸⁴ Guenter T. and Reynolds F., *Carver on Bills of Lading*, (Sweet & Maxwell, 3rd ed., 2011), para.9-097. It stated in Carver that it is not so true to say that the English court has always paid attention to decisions of courts in other convention countries. In *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd* [1929] A.C. 223, Lord Sumner said: “Of foreign decisions of course, the legislature is not deemed to take a notice and, although the Conference was doubtless well acquainted with the United States cases, it has not yet been held that the Legislature of this country is deemed to know what those, whose reports or conventions it affirms, have been familiar with,” p.237. See also *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd (The Kapitan Ptko Voivoda)* [2003] 1 C.L.C. 1092, p.1114.

1.6.1.1 The use of international conventions

English judges are conscious of the international nature of international carriage conventions (i.e. Hague/Hague-Visby Rules) and periodically seek uniformity in the laws of States adhering to the convention. The Hague/Hague-Visby Rules are silent as regards their interpretation.⁸⁵ In the context of the Hague/Hague-Visby Rules, a special attraction is usually stated to exist with the case law of the United States given that they are a principal sources of maritime law at the time of adoption of the Hague Rules (1924 Convention) as well as its participation both in the drafting of the Rules and in the methodology of the Harter Act.⁸⁶ For example, in *The Muncaster Castle*,⁸⁷ the House of Lords stressed the importance of United States law where the concepts in the

⁸⁵ *Stag Line Ltd v Foscola, Mango and Co.* [1932] A.C. 328. Two main issues arose in respect of the Hague Rules: first, a departure from the contract route for the purpose of dropping two engineers ashore who had been on-board for the carrier's interest; second, could the carrier who had deviated unprotected by Article IV(4) seek exclusion of liability under one of the causes listed in Article IV(2)? The House of Lords gave negative answers leaving the carrier open to liability at large. Lord Macmillan stated that: "As these rules must come under the consideration of foreign courts, it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules be construed on broad principles of general acceptance," p.350. See also *Tilbury v International Oil Pollution Compensation Fund* [2003] EWCA Civ 65; [2003] 1 Lloyd's Rep. 327 at [16]; [21] (Mance LJ); *Anglo-Irish Beef Processors International v Federated Stevedores Geelong* [1997] 2 V.R. 676, p.696 as per Phillips J; *Shipping Corp of India Ltd v Gamlen Chemical Co. (A/Asia) Pty Ltd* (1980) 147 C.L.R. 142, p.159 (Mason & Wilson JJ). For the carriage of goods by air, see *The Warsaw Convention* (1929) and *Corocraft Ltd v Pan American Airways Inc* [1969] 1 Q.B.616, where Lord Denning stated: 'Even if I disagree, I would follow [decisions of other courts] in a manner which is of international concern. The courts of all countries should interpret [the Warsaw Convention] in the same way,' p.655.

⁸⁶ Generally, see *Effort Shipping Co. Ltd v Linden Management SA, (The Giannis NK)* [1998] A.C. 605; [1998] 1 Lloyd's Rep. 337. Lord Steyn stated: 'In the construction of an international convention, an English court does not easily differ from a crystallised body of judicial opinion in the United States,' p.623. In the same case, Lord Lloyd of Berwick added a need for 'prevailing harmony on the other side of the Atlantic,' p.615.

⁸⁷ In *Riverstone Meat Co. Pty Ltd v Lancashire Shipping Co. Ltd (The Muncaster Castle)* [1961] A.C. 807, the House of Lords stated that: "These are words which were found and no doubt are still found in the old bill of lading and charterparty exceptions, and they are words that are found in legislation which preceded this Act and upon which this Act was founded, and especially, it is to be noted, are to be found in the Harter Act, which was the forerunner of all Acts of this kind, in relation to the carriage of goods by sea. I think it is very important in commercial interests that there should be uniformity of construction adopted by the courts in dealing with words in statutes dealing with the same subject-matter, and it is a matter of great satisfaction to me to find that the decisions of these courts seem to correspond with the decisions given by the courts of the highest authority in the United States."

Hague/Hague-Visby Rules were taken from the Harter Act.⁸⁸ However, such an approach seems to be followed only in the absence of clear wording.⁸⁹

1.6.1.2 The use of *Travaux Préparatoires*⁹⁰

In the case of the Hague/Hague-Visby Rules, the *travaux préparatoires* have only been available since 1990⁹¹ and one might expect to see a greater use being made of them. Nevertheless, as Carver⁹² has noted, the use of the *travaux préparatoires* for interpretation matters might be limited because ‘as often occurs, the *travaux préparatoires* are rich in ambiguity.’⁹³ They are often considered as merely throwing light on the general objectives and the trend of the discussions at the time. However, it has been said that ‘only a bull’s eye counts’.⁹⁴ Nonetheless, the general view was explained in writings by Lord McNair in 1961 and is believed to remain true today, if it is not even more valid

⁸⁸ Regardless of the English court accepting a forward-thinking approach in respecting the international character of the Hague/Hague-Visby Rules, they are prone to being inconsistent with other jurisdictions in its interpretation, as the court seems to be influenced largely by pre-convention English case law; the English court had held in *The Ferro* [1893] P 28, that such a clause did not exclude liability for bad stowage. Viscount Sumner stated that the Rules did not alter the position at p.103. This divergence of views originates from the interpretation of the Rules that might emerge due to the way that the Rules were drafted on the basis of one (common law) legal system. Thus, they cannot receive a uniform application in other legal systems, i.e. civil law country.

⁸⁹ The Hague Rules did not explicitly state whether or not a carrier is guilty of unjustifiable deviation and could exclude its liability through the list of exclusions contained in Article IV(2) of the Rules. In *Stag Line Ltd v Foscolo, Mango & Co. Ltd* [1932] A.C. 328, the House of Lords insisted that, regarding the effects of deviation, the courts should follow the domestic rules which pre-dated the Hague Rules. It was stated that “if it had been the intention of the legislature to make so drastic a change in the law relating to contracts of carriage of goods by sea, the change should and would have been enacted in clear terms,” p.347.

⁹⁰ The *locus classicus* on this point is given in the leading air-carriage case by the House of Lords in *Fothergill v Monarch Airlines Ltd* [1981] A.C. 251, where Lord Wilberforce’s statement was cited with approval (see *Jindal Iron & Steel Co. Ltd v Islamic Solidarity Shipping Co. Jordan Inc (The Jordan II)* [2004] 1 W.L.R. 1363, p.1372, per Lord Steyn.) that: ‘I think that it would be proper for us...to recognise that there may be cases where such *travaux préparatoires* can profitably be used,’ p.278.

⁹¹ Sturley, M. F., *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, (Fred Rothman, 1990).

⁹² Also see Guenter, T., and Reynolds, F., *Carver on Bills of Lading*, (Sweet & Maxwell, 3rd ed., 2011), para.9-098.

⁹³ *Jl MacWilliam Co. Inc v Mediterranean Shipping Co. SA (The Rafaela S)* [2003] EWCA Civ 556; [2004] Q.B. 702, p.725; [2003] 2 Lloyd’s Rep.113, per Rix LJ.

⁹⁴ *The Giannis NK* [1998] A.C. 605, 623, per Lord Steyn.

given the spread of the available *travaux préparatoires*; ‘It would hardly be an exaggeration to say that in almost every case involving the interpretation of a treaty, one or both parties seeks to invoke the preparatory work.’⁹⁵

In examining the concept of seaworthiness, therefore, it is also essential to consider the arguments of legal scholars and experts relating to seaworthiness based on the *travaux préparatoires*.⁹⁶

1.6.2 The special aspects of interpretation of the Rotterdam Rules

The style of drafting of the Rotterdam Rules has received some criticism⁹⁷ on the basis⁹⁸ of the Rules being of an unfamiliar form.⁹⁹ This aspect makes it necessary for this study to consider references and approaches to the Rotterdam Rules, along with the views of legal scholars and experts on seaworthiness.

⁹⁵ Lord McNair, *The Law of Treaties*, (2nd ed., 1961), p.412.

⁹⁶ Furthermore, one must bear in mind that the sea-carriage conventions are each an international convention with the status of a ‘treaty’ for the purpose of the Vienna Convention on the Law of Treaties 1969. Article 2(a) provides: ‘treaty’ means an international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

⁹⁷ Thomas, R., ‘And then there were the Rotterdam Rules’ (2008) 14 JIML 189. ‘*The drafting on occasion is tortuous and whereas it is quite clear that those who drafted the convention were seeking clarity and certainty...the abiding impression is that the very opposite is being achieved. There arises a spectre of a new and endless stream of contested litigation and arbitration which will, of course, not disappoint all interested parties,*’ p.189.

⁹⁸ One should not turn away from a similar reaction of disquiet by the maritime lawyers in relation to drafting at the time of adopting the Hague and Hague-Visby Rules, when they were regarded as riddled with uncertainty, unfamiliar in drafting technique and bound to endless litigation. See Rainey S. QC, ‘Interpreting the international sea-carriage conventions: old and new’ cited as Chapter Three in Thomas, R. (ed.), *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd’s List, 2010), p.69.

⁹⁹ Tetley, W., ‘Summary of Some General Criticisms of the UNCITRAL Convention (the Rotterdam Rules)’ cited as Chapter 16 of Gutierrez, N. M. (ed.), *International Maritime Law: Essays in Honour of Professor David Joseph Attard*, (Routledge, 2009). “*In general, the Rotterdam Rules are in content, terms, style and drafting in an unfamiliar form. This not only erases years of practice and custom but sets aside 100 years of established jurisprudence,*” p.253.

It is worth mentioning that Article 2 of the Rotterdam Rules refers to the 'Interpretation of this Convention' and provides '*in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*'¹⁰⁰ Commentators¹⁰¹ suggest that this would demand an English court to consider the systems of other jurisdictions on this subject matter and to borrow from them, as necessary.

Finally,¹⁰² and most recently in a non-marine case, *In re Deep Vein Thrombosis and Air Travel Group Litigation*,¹⁰³ Lord Mance, in the context of air carriage, stated that '*the legislative history and travaux préparatoires may be considered to resolve ambiguities or obscurities, when the material is publicly available.*'

In the case of the Rotterdam Rules, the Internet now permits the widest and most publicly available collection of *travaux préparatoires* that there ever has been after it was proclaimed that they can hardly be available to the public or even specialist lawyers.¹⁰⁴ It is possible to search through and access the negotiations as they were conducted in minute detail. There is no doubt that this is the source of information for many researching these rules.¹⁰⁵ Some of the drafters of the Rotterdam Rules had concluded that 'courts and arbitrators

¹⁰⁰ Furthermore, under Articles 18, 26 and 31 of the Vienna Convention of the Law of Treaties 1969, the obligation of an English court would commence from the minute of signature; that a court (i.e. an English court) must be refrained from pursuing any action that would defeat '*the object and purpose of international treaties (i.e. the Rotterdam Rules).*'

¹⁰¹ See Harakis, M., 'From treaty to trial: the implementation of the Rotterdam Rules' cited as Chapter Two of Thomas, R., *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd's List, 2010), p.30.

¹⁰² *Fothergill v Monarch Airlines* [1981] A.C. at 281. Lord Scarman stated that: '*an agreed conference minute of the understanding upon the basis which the draft of an article of the convention was accepted may well be a great clue.*'

¹⁰³ *In Re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 A.C. 495, at p.513.

¹⁰⁴ This might be a reason why some judges are reluctant to use the drafting history. See Thomas, R., 'The Carriage of Goods by Sea under the Rotterdam Rules', (2010, Lloyd's List), para. 3.83.

¹⁰⁵ See the information which is accessible: http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_travaux.html.

should respect interpretation results as a whole and not just look into sources connected with applicable national law'.¹⁰⁶ However, the *travaux préparatoires* are silent on some complexities of the rules. It is likely that States would interpret rules differently¹⁰⁷ and the liability regime may become more complicated than it is at present.¹⁰⁸

1.7 Conclusion

Under the current law the duty to exercise due diligence to make a vessel seaworthy is limited to the time before or at the beginning of the voyage. However, due to extensive developments in the shipping industry and changes in merchants' practices, in general, the current law (and seaworthiness provisions in particular) requires modification in order to cope with those changes. These changes are acknowledged in the Rotterdam Rules.

There are a number of examples of how this has been done under the Rotterdam Rules; one is the sphere of application of the Rotterdam Rules covering the carriage of goods by sea, as well as multimodal/door-to-door transport operations involving at least one sea leg. However, this thesis seeks to concentrate solely on seaworthiness under the two regimes and to carry out a comparative study. The aspects of seaworthiness that this thesis discusses are set out below.

¹⁰⁶ See Alexander von Ziegler, Johan Schelin and Stefano Zunarelli who have explained briefly the way that the Rules must be interpreted in their edited book *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Wolters Kluwer, 2010), p.32.

¹⁰⁷ See f.n. 89, at p.72.

¹⁰⁸ See the discussion in para. 3.9.3.3, at p.225. Also, see para. 3.9.3.4, at p. 230, suggesting different interpretations for the word 'probably'.

The first to be considered is the nature and meaning of 'due diligence' under both regimes. This includes looking at the extension of the duty to exercise due diligence under the Rotterdam Rules to provide a seaworthy vessel during the entire voyage.

The next area to be considered is the liability regime under both sets of Rules and the burden of proof in relation to the duty. This Chapter has noted that Industry Regulations influence both directly and indirectly the seaworthiness of the vessel. This raises the question 'would the non-compliance of the carrier with Industry Regulations, which are not part of the Hague-Visby or Rotterdam Rules, have an impact on the obligation of seaworthiness?' This is considered in Chapter Four, which considers the ability of the old and new regimes to accommodate changes to the industry and Industry Regulations. This will include assessing how the development of the shipping industry affects the seaworthiness of a vessel and whether the Rotterdam Rules support such changes and, if necessary, cover any gaps.

The third area for consideration is the effect of the multimodality of the Rotterdam Rules on the nature of the Duty and how it affects the Duty in comparison with the current regime.

The rise in containerisation has been one of the largest changes to the shipping of goods by sea since the drafting of the Hague-Visby Rules. The inclusion of a container as part of the seaworthiness requirement will be considered in Chapter Six. This will include looking at the different effects of implying, under the current law, the supply of a fit container as part of the seaworthiness obligation in different jurisdictions under both sets of Rules.

Finally, examining the changes in the Rotterdam Rules will provide a solution to the basic question of whether the Rotterdam Rules are a better choice to govern the obligation of seaworthiness. In order to answer this question, consideration will be given to the sections of the *travaux préparatoires* that relate to seaworthiness. It follows that if, in the case of ambiguity, the courts are turning to these materials for assistance, well drafted, comprehensive and helpful *travaux préparatoires* will help to avoid a rise in expensive litigation. Such usage will also aid a more harmonised interpretation of the Rules throughout the different States that adopt them.

This thesis will also consider whether the Rotterdam Rules provide a better system in light of the liability of seaworthiness and thus whether they should replace the current regime.

One may say that the extension of the scope of the seaworthiness obligation would balance the relationship between the parties to the carriage contract. The differences in the Rotterdam Rules, in the current eyes of the law, need to be taken into account in order to decide whether the Rotterdam Rules constitute a sound regime in a way that considers the changes required.¹⁰⁹

This work has confined the study to the effect of seaworthiness under both the Hague/Hague-Visby Rules and the potential effect of implementing the Rotterdam Rules into the legislation of the United Kingdom, United States and on a smaller scale, other jurisdictions. Thus, it does not cover the effect of seaworthiness under the common law. However, the fruitful experience of the precedents of the courts in this field (common law) will be used. Due

¹⁰⁹ The standard 'demanded of a reasonable and prudent shipowner is, of course, likely to change over years.' *The Garden City* [1982] 2 Lloyd's Rep. 382, p.395.

consideration shall be given to the practice and concerns of the maritime industry; i.e. masters, seafarers, ship operators, cargo-owners, etc. Because of this, the research is written in such a way that it will not only benefit people who possess a legal background but also the laymen within the maritime industry who are affected by the latest changes, as it will aid understanding of the changes and their impact on the obligation of seaworthiness when deciding to which regime they should adhere. Furthermore, solutions and recommendations are given throughout this study to support an alternative and better approach to the law of seaworthiness.

To achieve the purpose of this study, the thesis is divided as follows:

Chapter Two: The concept of 'due diligence' under the Hague/Hague-Visby Rules and Rotterdam Rules. This Chapter is divided into two parts: the first will predominantly discuss the provision related to the obligation of seaworthiness, i.e. Article III, r.1 of the Hague/Hague-Visby Rules. The second part will, in the main, discuss Article 14 of the Rotterdam Rules.

Chapter Three: Burden of proof and commercial risk allocation under the Hague/Hague-Visby Rules and the Rotterdam Rules. This Chapter is also divided into two parts: the first will mainly discuss Article IV, 1 and part of r.2 of the Hague/Hague-Visby Rules. The second part will focus on Article 17(1)-(6) of the Rotterdam Rules.

Chapter Four: Effects of shipping standards on seaworthiness.

Chapter Five: The implication of the multimodal aspect of the Rotterdam Rules on the seaworthiness obligation and the consequent liability. This Chapter will primarily discuss the effect of the multimodality provisions of the Rotterdam

Rules, e.g. Articles 26 and 82, on the obligation of seaworthiness and the consequent liability.

Chapter Six: Supply of containers and 'seaworthiness' - The Rotterdam Rules perspective. This Chapter is divided into two parts; the first will discuss the aspect of container cargoworthiness under the current law, e.g. the Hague/Hague-Visby Rules. The second part will discuss the new obligation of container cargoworthiness that is included in Article 14(c) of the Rotterdam Rules.

Chapter Seven: Conclusion and recommendations.

CHAPTER TWO

THE CONCEPT OF ‘DUE DILIGENCE’ UNDER THE HAGUE/HAGUE-VISBY RULES AND ROTTERDAM RULES

- Introduction

In the previous Chapter, the concept of seaworthiness was explained and its scope defined and described in relation to both the vessel's fitness and her cargoworthiness. This Chapter deals with the concept of the carrier's/shipowner's obligation to exercise 'due diligence' to provide a seaworthy vessel. This is necessary in order to understand and explain whether the Hague/Hague-Visby Rules are sufficiently sound with regard to the nature of the seaworthiness duty and whether the obligation under the Rotterdam Rules provides a better basis of law; i.e. does it close any of the gaps that have been identified in practice over the years and is it attuned to today's commercial needs, modern transport and international trade practices?

Therefore, this Chapter will be split into two parts. Part One briefly explains the nature of the due diligence obligation (or duty) under the Hague/Hague-Visby Rules. Part Two covers the changes introduced by the Rotterdam Rules. It deals, in particular, with the extension of the 'due diligence' obligation and analyses whether it is practically possible to be fulfilled.

The issues that will be explored include: (i) the duty before and at the commencement of the voyage; (ii) whether the duty differs in any respect after

the commencement of the voyage; and (iii) how strict the remedying of unseaworthiness is expected to be.

Part I: The Obligation under the Hague/Hague-Visby Rules

2.1 The Nature of the Duty

The seaworthiness obligation under the common law is absolute. However, in the majority of cases, this absolute obligation is modified in the contract of carriage either by some contractual provision,¹ such as those found in standard form terms,² or by the application of the Hague/Hague-Visby Rules. The Hague/Hague-Visby Rules can apply either by express contractual incorporation or be mandatorily implied into the contract by statute or the Rules themselves. In the case of the latter, the Hague/Hague-Visby will be applied to the contract of carriage as a matter of the law applicable to the contract of carriage.

Regardless of which, the duty is the same; the carrier's absolute obligation to provide a seaworthy vessel is compromised and is substituted by his obligation to exercise 'due diligence' before and at the beginning of the voyage to provide a seaworthy vessel. It is important to explore the nature of the duty in the

¹ For instance, under the Gencon form charterparty, when this is the governing contract of carriage and not the Bill of Lading, if any, the absolute duty is modified by virtue of Clause 2.

² See Todd, P., *Contracts for the Carriage of Goods by Sea*, (BSP Professional Books, 1988), pp.51-54.

context of Article III, rule 1 of the Hague/Hague-Visby Rules and in the context of the regime proposed under the Rotterdam Rules.

2.2 The Obligation to Exercise Due Diligence to Make the Vessel Seaworthy

As noted above, the former absolute obligation of seaworthiness on the shipowner/carrier was replaced by a less stringent obligation to exercise due diligence to make the vessel seaworthy.³ The Hague/Hague-Visby Rules themselves do not provide any definition or guidance in this respect. It was not until 1961 when the House of Lords in the case of *The Muncaster Castle*⁴ changed the status quo and provided guidance.

2.3 The Origin of ‘Due Diligence’

The principle that a vessel must be seaworthy upon the commencement of her voyage has long been recognised in maritime law, which has implied a warranty of seaworthiness⁵ into contracts for the carriage of goods by sea. The introduction of the duty to exercise due diligence has changed the nature and extent of the obligation.

The concept of due diligence was first introduced in the Liverpool Conference Form of 1882 where it contained a reference to the “*want of due diligence by*

³ See Diamond A., QC, ‘Responsibility for Loss of, or Damage to, Cargo on a Sea Transit: The Hague or Hamburg Conventions?’ A paper cited in Koh Soon Kwang (ed.), *Carriage of Goods by Sea*, (Butterworths, 1986), p.110.

⁴ *The Muncaster Castle* [1961] 1 Lloyd’s Rep. 57. Some guidance was given on the content of the duty by ruling that, in matters of seaworthiness, the owner may be found liable for his own fault and for the faults of his employees, as well as for the faults of independent contractors, such as the dockyard workers. This point is explained in detail below. See para. 2.4, at p.85 for the definition of due diligence.

⁵ Carver, T. G., *Carriage by Sea*, (1982, Stevens & Sons), Part one, para. 140a.

the owners of the ship".⁶ In the late nineteenth century, in order to tip the balance in favour of the carrier, the USA Harter Act of 1893⁷ adopted the 'exercise of due diligence concept'.⁸ It was then adopted in the Hague Rules⁹ (later amended), which were enacted into English law by the Carriage of Goods by Sea Act 1924 and later amended by the Visby Protocol, which became part of English law by enactment of the Carriage of Goods by Sea Act 1971. These are known as the Hague-Visby Rules. The relevant provisions are Article III, rule 1 and Article IV, rule 1. These provide as follows:

Article III, rule 1

"The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

(a) make the ship seaworthy;

(b) properly man, equip and supply the ship;

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation."

Article IV, rule 1

⁶ Cadwallader, F. J., 'Seaworthiness - An Exercise of Due Diligence' presented at Bill of Lading Conventions Conference, New York, November 29/30 (1978, Lloyd's of London Press), p.2.

⁷ Under the Harter Act, the phrase 'due diligence' was merely used as a minimum required standard to ensure that the vessel was seaworthy. Section 2 of the Harter Act states: "*It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligation of the owner or owners of said vessel to exercise due diligence...*" The carrier would not be able to limit his liability if he failed to exercise this minimum requirement.

⁸ See Wilson, J., *Carriage of Goods by Sea*, (7th ed., Pearson Longman, 2010), p.188; also see Astle, W., *Shipping and the Law*, (Fairplay Publications, 1997), p.16; Gold, E., *Gard Handbook on P&I Insurance*, (5th ed., 2002, Royle Corporate), p.332.

⁹ See Girvin, S., *Carriage of Goods by Sea*, (Oxford University Press, 2nd ed., 2011), para. 27.25.

“Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or the person claiming exemption under this article.”

The common law absolute warranty of seaworthiness must not be implied into contracts to which the Rules apply. Section 3 of the Carriage of Goods by Sea Act 1971 reads that *“There shall not be implied in any contract for the carriage of goods by sea to which the Rules apply by virtue of this Act any absolute undertaking by the carrier of the goods to provide a seaworthy ship.”*

The carrier is entitled to the protection of the exemptions listed in Article IV, r.2 where he can prove that he exercised due diligence to make the vessel seaworthy. The common law obligation¹⁰ is rarely implied by the courts today due to one of the following reasons: i) contracts of carriage under bills of lading are subject to the Hague/Hague-Visby Rules; ii) the rules are incorporated in charterparties; or, iii) charterparties contain similar express ‘due diligence’ provisions.¹¹

¹⁰ See *Lyon v Mells* (1804) 5 East 428, p.437 (102 E.R. 1134, 1137), per Lord Ellenborough.

¹¹ Most of these clauses are construed to change the absolute obligation. For example, see Yates, D., (ed.), *Contract for the Carriage of Goods by Land, Sea and Air*, (Lloyd’s London Press, 1993), para.1.6.9.3. The position under Article III, r.1 of the Rules is reinforced by s.3 of the UK Carriage of Goods by Sea Act 1971. For similar provisions in other jurisdictions, see s.2 of the Carriage of Goods by Sea Act 1986 (South Africa); s.17 of the Carriage of Goods by Sea Act 1991 (Australia); s.5 of the Hong Kong Ordinance No. 104 of 1994; and, s.4 of the Carriage of Goods by Sea Act 1978 (Singapore).

Therefore, it can be seen that the obligation to only exercise due diligence to make the vessel seaworthy, as described in the Hague/Hague-Visby Rules, is less onerous than the common law obligation.

The substantial change to the carrier's obligation can be easily understood by comparing, for instance, the liability of the carrier in cases where damage is caused by latent defect. In *The Glenfruin*,¹² a case decided under the common law regime, the shipowner was held liable by reason of the ship's unseaworthiness even though this was due to latent defects, which would have been impossible to discover. By contrast, in *The Australian Star*,¹³ a case decided under the regime introduced by the Hague/Hague-Visby Rules, the shipowner was not held liable for damage arising from the unseaworthiness of the vessel by reason of a certain defect existing at the commencement of the voyage, which could not have been discovered by the exercise of due care.

2.4 'Due Diligence' Defined

The term 'due diligence' is not defined by the Hague/Hague-Visby Rules themselves, or indeed by any other rule.¹⁴ It has, however, been considered in a number of cases, in particular, *The Muncaster Castle*.¹⁵ In this case, Willmer LJ said that "[a]n obligation to exercise due diligence is to my mind indistinguishable from an obligation to exercise reasonable care - a concept not unfamiliar in English Law..."

¹² *The Glenfruin* (1885) 10 P.D. 103.

¹³ *The Australian Star* [1940] 67 Ll. L. R. 110.

¹⁴ The Harter Act and the Hamburg Rules also do not define 'due diligence'.

¹⁵ *The Muncaster Castle* [1960] 1 Q.B. 536 at p.581 per Willmer LJ; see also *The Amstelslot* [1962] 1 Lloyd's Rep. 539, p.553 per McNair J; [1963] 2 Lloyd's Rep. 223, p.235 per Lord Devlin; *The Kapitan Sakharov* [2000] C.L.C. 933, pp.947-948, per Auld LJ; *Wilson & Clyde Coal Co. v English* [1938] A.C. 57, p.80, per Lord Wright; *Davie v New Merton Board Mills* [1959] A.C. 604, pp.651-652; *Tesco Supermarkets v Natrass* [1972] A.C. 153, at p.199, per Lord Diplock.

Similarly, in other Common Law countries, it has been stated that due diligence was “*not merely a praiseworthy or sincere, though unsuccessful, effort, but such an intelligent and efficient attempt as shall make it [seaworthy] as far as diligence can secure it.*”¹⁶ Referring to American and English authorities,¹⁷ Tetley¹⁸ defines due diligence as “*an appropriate, competent and reasonable effort by the carrier to fulfil the obligations stated in Article III r.1 of the Hague/Hague-Visby Rules.*”

However, reference to the ordinary meaning of the words ‘due diligence’ may assist in finding the exact meaning. ‘Due’¹⁹ means “all that which is proper” and ‘diligence’ is referred to as “paying attention and being careful to duties.”²⁰ One may therefore, say that a carrier exercises due diligence when he pays “*all that*

¹⁶ *Grain Growers Export Co. v Canada Steamship Lines Ltd* (1918) 43 O.L.R. 330, at pp.344-345 (Ont. S.C. App. Div.), upheld (1919) 59 S.C.R. 643 (Supr. C. of Can.) cited in Tetley, W., *Marine Cargo Claims*, (Blais, 4th ed., 2008), at p.876.

¹⁷ Tetley, W., *Marine Cargo Claims*, (Blais, 4th ed., 2008), pp.876-877, refers to *F.C. Bradley & Sons v Federal Steam Navigation Co.* (1926) 24 Ll. L. Rep. 446 (C.A.), at p.454, per Scrutton LJ, “*The ship must have that degree of fitness which an ordinary owner would require his vessel to have at the commencement of the voyage having regard to all probable circumstances of it,*” cited with approval in *The Fjord Wind* [2000] 2 Lloyd’s Rep. 191 (C.A.), p.197, per Clarke LJ; *The Lendoudis Evangelos* [2001] 2 Lloyd’s Rep. 304, at p.306, per Cresswell J, and *The Eurasian Dream* [2002] 1 Lloyd’s Rep. 719, at p.736, per Cresswell J who enumerated the following aspects of seaworthiness: physical condition of the vessel and equipment; competent/efficient crew and master; adequacy of stores, bunkers and documentations; and, cargoworthiness. The last three cases were cited in the 4th edition of Tetley, W., *Marine Cargo Claims*.

¹⁸ Tetley defined it as: “*genuine, competent and reasonable effort of the carrier to fulfil the obligations set out in subparagraph (a), (b) and (c) of Art III (1) of the Hague or Hague-Visby Rules.*” Tetley W., *Marine Cargo Claims*, (4th ed., 2008), pp. 876-877. Tetley’s definition is referred to by Cadwallader, F. J., ‘Seaworthiness - An Exercise of Due Diligence’, presented at Bill of Lading Conventions Conference, New York, November 29/30 (1978, Lloyd’s of London Press), at p.3.

¹⁹ Cadwallader, F. J., ‘Seaworthiness - An Exercise of Due Diligence’, presented at Bill of Lading Conventions Conference, New York, November 29/30 (1978, Lloyd’s of London Press), at p.3. See *The Foulkes Case* (1880) 5 CPD 157, p.171, per Thesiger LJ (‘due and reasonable care’); *British Road Services v Arthur v Crutchley Ltd* [1968] 1 All ER 811, p.820, per Lord Pearson, p.824, per Sachs LJ (‘proper care’); *Great China Metal Industries Co. Ltd v Malaysian International Shipping Corp Bhd (The Bunga Seroja)* (1998) 72 ALRJ 1592, p.1637, per Callinan J (‘appropriate care’).

²⁰ *Cambridge Advanced Learners’ Dictionary*, (3rd ed., 2008).

*attention to his duties to provide a seaworthy vessel as is properly to be expected of a carrier of goods by sea.*²¹

From the above definitions, one can say that the elasticity of the obligation imposed by the phrase 'due diligence' requires the court to "*rely on common sense, expert information, and domestic and foreign case law*",²² in order to ascertain whether the carrier has discharged his obligation as to seaworthiness. It is to be noted that expert information embraces the development of the shipping industry's standards, which effectively might increase or reduce the standard of due diligence required by a carrier.

It should be noted, however, that, in the context of the Hague/Hague-Visby Rules, the carrier's due diligence obligation is, insofar as independent sub-contractors are concerned, rather higher, demanding and uncompromising compared to the common law position in the tort of negligence.²³ This is because, to a certain extent, bar only cases of a latent defect, it might impose a heavier burden on the carrier. The standard of care imposed by the duty to exercise due diligence to provide a seaworthy vessel is different from the common law obligation of care in that it is a personal obligation that cannot be delegated.²⁴ For instance, the carrier is not relieved from liability for

²¹ Cadwallader, F. J., 'Seaworthiness - An Exercise of Due Diligence', presented at Bill of Lading Conventions Conference, New York, November 29/30 (1978, Lloyd's of London Press), at p.3.

²² See Delebecque, P., 'Obligation of the Carrier' cited as Chapter 4 in Alexander von Ziegler, Johan Schelin and Stefano Zunarelli (eds.) *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Wolters Kluwer, 2010), p.88.

²³ Margetson N. J., *The system of liability of Articles III and IV of the Hague [Visby] Rules*, (Paris Legal Publisher, 2008), p.47.

²⁴ *Paterson S.S. Ltd v Aluminum Co. of Can. (The Hamildoc)* 1950 CarswellQue 269 (Can. Que. K.B.)(WL), 1950 AMC 1973, *The Muncaster Castle* [1961] AC 807 (HL); *The Eurasian Dream (No.1)* [2002] EHCW (Comm) 118, at [155], [2002] 1 Lloyd's Rep. 719 (Q. B.), at 744; *Union of India v N.V. Reederij Amsterdam (The Amstelslot)* [1963] 2 Lloyd's Rep. 223 (H.L.), at 235. See also, Nikaki, T., 'The Carrier's Duties under the Rotterdam Rules: Better the Devil you Know?' (2010) 35 Tul. Mar. LJ., p.18.

unseaworthiness caused by the negligence of subcontractors and repairers.²⁵

This is because “*what is required [by] due diligence is the work itself*”,²⁶ which is imposed on the carrier and not merely due diligence in selecting a reputable subcontractor or agent. Failure, therefore, of the carrier to discover bad craftsmanship entails liability on him. He has no choice but to take care and diligently supervise the work entrusted to the repairer. This effectively means that the carrier needs either to discover any negligent work entrusted to the repairer or to make sure that “*servants, agents or independent contractors, had exercised all reasonable skill and care to ensure that the vessel was seaworthy at the commencement of its voyage, namely, reasonably fit to encounter the ordinary incidents of the voyage.*”²⁷ The position has been re-confirmed in two fairly recent cases: *The Kapitan Sakharov*²⁸ and *The Happy Ranger*.²⁹ In the

²⁵ *The Happy Ranger* [2006] 1 Lloyd's Rep. 57; *W. Angliss and Company (Australia) Proprietary Ltd v Peninsular and Oriental Steam Navigation Company* [1927] 2 K.B. 456.

²⁶ *The Muncaster Castle* [1961] A.C. 807, p. 850, per Lord Merriman.

²⁷ *Northern Shipping Co. v Deutsche Seereederei GmbH & Ors (The Kapitan Sakharov)* [2000] C.L.C. 933, p.946.

²⁸ *Northern Shipping Co. v Deutsche Seereederei GmbH & Ors (The Kapitan Sakharov)* [2000] C.L.C. 933. In deciding whether or not the required due diligence was effectively exercised by the carrier, the test should be applied to the facts of the case and the court will need to make reference to shipping industry standards and recommendations at the material time, such as the tests required by SOLAS etc. This includes shipping practices and requirements of the shipping industry that directly or indirectly governs the obligation of seaworthiness, e.g. rules of classification societies; see *Western Canada S.S. Co. v Canadian Commercial Corp.* [1960] 2 Lloyd's Rep. 313, p.321, where the Canadian Supreme Court referred to “*the fact that the requirements of “sound commercial practice” are considered by many shipowners to be met by maintaining the Lloyd's Register of Shipping classifications requirements*”. See also *Corporacion Argentina de Productores de Carnes v Royal Mail Lines* (1939) 64 Ll. L. R.188, at p.190; *The Australian Star* (1940) 67 Ll.L. R.110 at p.117; *The Amstelslot* [1962] 1 Lloyd's Rep. 539 at p.555. For a case in which this was so, even though the view of Lloyd's was controversial, see the decision of the US District Court in *Peter Paul Inc. v M.S. Christer Salen* 152 F. Supp. 410. In the Netherlands, the Supreme Court in *The NDS Provider* drew an analogy between the holds of the vessel and the containers and held that the duty contained in Article III, r.1 of the Hague/Hague-Visby Rules applied to the container. See *Nile Dutch Africa Line B.V. Delta Lloyd Schadeverzekering (The “NDS Provider”)* C06/082HR, 1 February 2008. For the carrier to satisfy the test, he must show that he himself personally and his “*servants, agents or independent contractors, had exercised all reasonable skill and care to ensure that the vessel was seaworthy at the commencement of its voyage; namely, reasonably fit to encounter the ordinary incidents of the voyage.*”

²⁹ *The Happy Ranger* [2006] 1 Lloyd's Rep. 57; *W. Angliss and Company (Australia) Proprietary Ltd v Peninsular and Oriental Steam Navigation Company* [1927] 2 K.B. 456.

latter case, the carrier was found liable for a faulty hook of a crane aboard his brand new vessel which had recently come under the carrier's 'orbit'.³⁰

Accordingly, the author suggests that 'due diligence' may be defined as:

*The effort of a competent and reasonable carrier or any person working for him to provide a seaworthy vessel to fulfil the requirements set out in Article III, Rule 1.*³¹

Having outlined above how 'due diligence' has been or could be defined, I will now turn to the duration of the obligation and the problems associated with it.

2.5 Duration of the Obligation: The Time When the Carrier Must Begin to Exercise Due Diligence

Under the common law, the obligation of seaworthiness for a voyage charter attaches at the time of sailing.³² Otherwise, if the voyage is divided into a number of stages, then the requirement must be fulfilled at the beginning of each of those stages.³³ In the case of time charterparties and in the absence of any express provision, the obligation attaches at the time of delivery of the vessel by the owner to the charterer.³⁴

Insofar as the time the obligation attaches, the position under the Hague/Hague-Visby Rules (the "Rules") is different from that under the common

³⁰ In *The Muncaster Castle*, the term 'orbit' is used co-extensively with ownership or service or control.

³¹ Cadwallader, F. J., 'Seaworthiness - An Exercise of Due Diligence', presented at Bill of Lading Conventions Conference, New York, November 29/30 (1978, Lloyd's of London Press), it is stated that: "*Thus to exercise due diligence, it is required that the carrier makes a genuine, competent and reasonable effort to ensure this state*" at p.3.

³² *Bermon v Woodbridge* (1781) 2 Dougl. 788; *Kiptoff v Wilson and Others* (1875-76) L.R. 1 Q.B.D. 377.

³³ *Cohn v Davidson* (1877) 2 Q.B.D. 455, based on *Annen v Woodman* (1810) 3 Taunt. 299, *Moore and Another v Lunn and Others* (1922) 11 Ll.L. Rep. 86, p.92. See also *Wilh. Svenssons Travaruaktiebolag v Cliffe Steamship Company* [1932] 1 K.B. 490, p.493, per Wright J.

³⁴ *Giertsen v Turnbull* (1908) SC 1101.

law. Article III, r.1 requires that the carrier must exercise due diligence to provide a seaworthy vessel *'before and at the beginning of the voyage.'* The phrase has been interpreted as *'the period from at least the [beginning of the voyage] [the loading] until the vessel starts on her voyage...'*³⁵ This means that, for the purpose of fulfilling the obligation under the Rules, the carrier's obligation to exercise due diligence is likely to be required even during the period running up to that voyage (i.e. the preliminary voyage under ballast). Hence, one may reasonably ask when the obligation precisely starts and ends. In so far as the case law is concerned, such a query has not been raised. Even so, it is essential to attempt to answer this query and it is necessary to separately deal with two distinct points in time: *'before'* and *'at the beginning of the voyage'*. However, before dealing with these two points it is necessary to explain what is meant by the word *'voyage'* under the Rules.³⁶

2.6 What is meant by 'Voyage'?

For the purposes of the Rules, there are two important issues to be noted. First, voyage means the contractual voyage from the port of loading to the port of discharge. This is so even when a vessel has to call at a series of different loading ports to collect different cargoes for delivery to a series of different

³⁵ *Maxine Footwear Co. Ltd v Canadian Government Merchant Marine* [1959] A.C. 589, p.603, per Lord Somervell. The appellant was the consignees of a cargo loaded in Halifax for carriage to Kingston. The contract was under the Canadian WOGBS. Shortly before the vessel was due to sail, an attempt was made to thaw the frozen scupper pipes with acetylene torch and a fire started. The appellant's cargo was lost. The court held that the carrier failed to exercise due diligence before and at the beginning of the voyage. The vessel, as a result, was unseaworthy.

³⁶ This question was raised on many occasions: e.g. see the United Nations Conference on Trade and Development, 'The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention', Report by the UNCTAD secretariat, 31 December 1987 (TD/B/C.4/315 (part 1)), p.38, "*The provision in Art. III r.1 of the Hague/Hague-Visby Rules have led to many uncertainties in interpretation; for example, as to when the voyage begins.*"

discharge ports.³⁷ Indeed, it is true that in many jurisdictions the term 'voyage' is, perhaps quite unsurprisingly, termed as '*the bill of lading voyage*'.³⁸ Consequently, the carrier is obliged merely to exercise due diligence to make the vessel seaworthy at the very first contractual loading port for a particular cargo. This is the case irrespective of calls at intermediary loading ports.³⁹ By way of example, if a vessel loaded cargo A at the port of Felixstowe and then sailed to load cargo B at the port of Rotterdam, the carrier, at the port of Rotterdam, is under an obligation to exercise due diligence to provide a seaworthy vessel before and at the beginning of the voyage with regard only to cargo B. There is no longer any obligation on the carrier to exercise due diligence to make the vessel seaworthy in respect of cargo A. It suffices for cargo A that the carrier exercised due diligence to make the vessel seaworthy before and at the beginning of the voyage relating to the contractual port under the relevant bill(s) of lading, in our example, the port of Felixstowe.⁴⁰

The owners of cargo A, shipped at the port of Felixstowe, will be unable to recover for any loss or damage to their cargo on the basis of the carrier's failure to exercise due diligence at the second port (Rotterdam). As the law now stands under the Hague/Hague-Visby Rules, the effect is clear: two cargoes, loaded at two different ports, stowed adjacently to each other in the same or different

³⁷ *The Makedonia* [1962] 1 Lloyd's Rep. 316, pp.329-330. Hewson J stated that: "*I see no obligation to read into the word "voyage" a doctrine of stages, but a necessity to define the word itself. The word does not appear in the earlier Canadian Act of 1910. "Voyage" in this context means what it has always meant: the contractual voyage from the port of loading to the port of discharge as declared in the appropriate bill of lading.*"

³⁸ See Astle, W. E., *The Hamburg Rules: An appreciation of the cause and effect of the amendments to the Hague Rules and the Hague-Visby Rules*, (Fairplay Publications, 1981), p.98.

³⁹ In *Leesh River Tea Co. v British India Steam* [1966] 2 Lloyd's Rep. 193. Storm valve cover plates were stolen at an intermediate port. The Court of Appeal held that the vessel fulfilled the obligation required to provide a seaworthy vessel at the beginning of the voyage.

⁴⁰ E.g. *Leesh River Tea Co. v British India Steam Navigation Co.* [1966] 2 Lloyd's Rep. 193. See also, Sir Guenter Treitel, F. M. Reynolds, *Carver on Bills of Lading*, (Sweet & Maxwell, 3rd ed., 2011), para.9-134. See also, Wilson J., *Carriage of Goods by Sea*, (Longman-Pearson, 7th ed., 2010), p.188.

cargo holds suffering the same physical damage inflicted by the same cause, would have a different finding on the question of the carrier's liability depending on each cargo's port of loading.⁴¹ It seems that extending the obligation of due diligence to make the vessel seaworthy during the whole voyage would be a solution that would certainly remove such an apparently unjust discrepancy on the issue of the carrier's liability and would improve the position of the cargo-interests vis-à-vis the carrier/shipowner.⁴² It is debatable whether this would be a fair solution between the carrier/cargo-owner, and policy considerations would need to be considered by the legislature. In the Rotterdam Rules, however, this position has been adopted.⁴³ It might be the case that any change removing such uncertainties and making all parties aware of their respective duties and risks and, therefore, their potential rights and liabilities, would be welcomed.

The second point is that, unlike the position under the common law and the doctrine of stages,⁴⁴ the Hague/Hague-Visby Rules do not oblige the carrier to provide a seaworthy vessel at the beginning of each stage nor do they allow the carrier to split a voyage into a series of voyages.⁴⁵ As regards charterparties,

⁴¹ Nicholas, A., 'The duties of carriers under the conventions: care and seaworthiness' cited as Chapter 6 in Thomas, R. (ed.) *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa, 2010), p.117.

⁴² The wording of Article 14 of the Rotterdam Rules is likely to be a solution to such a problem.

⁴³ The duty under the Rotterdam Rules is not restricted until the time before the beginning of the voyage. It is also extended to the entire voyage. This point will be covered below.

⁴⁴ For a detailed explanation on the effect of Article III, r.1 on the doctrine of stages, see Clarke, M., *Aspects of the Hague Rules; A comparative study in English and French law*, (Martinus Nijhoff, 1976), at p.230-233. See Treitel, G., Reynolds, F., *Carver on Bills of Lading*, (Sweet & Maxwell, 3rd ed., 2011), para.9-021.

⁴⁵ See *Leesh River Tea Co. v British India Steam Navigation Co.* [1966] 2 Lloyd's Rep. 193. See Wilson J., *Carriage of Goods by Sea*, (Pearson, 2010), p.188. Also, see Sir Eder, B., Foxton QC, D., Berry QC, S., Smith QC, C. and Bennett, H., *Scrutton on Charterparties and Bills of Lading*, (Sweet & Maxwell, 22nd ed., 2011), para.20-045. See also Tetley, W., *Marine Cargo Claims*, (Blais, 2008, 4th ed.), p.895. The author is of the opinion that if a vessel has loaded part of the cargo alongside a jetty, then, for the purposes of draft restriction, has moved to anchor to load the rest of the cargo by lighters barges, it is not to be constituted as a stage within a voyage due to the fact that in such a case the voyage must not be understood to have commenced. See the below sections.

the doctrine of stages does not apply to a cargo claim under the Hague/Hague-Visby Rules.⁴⁶

2.6.1 ‘Before’ the Voyage – The Time When the Carrier Must Begin to Exercise Due Diligence⁴⁷

The period of ‘before’ was illustrated by Lord Somervell when he stated that “*The word “before” cannot ... be read as meaning “at the commencement of the loading”. If this had been intended, it would have been said*”.⁴⁸ Despite the fact that the standard of the duty in exercising due diligence is increased during and at the end of the loading and the final preparation of the loading,⁴⁹ the aforementioned quotation is obviously enough to indicate that the obligation attaches earlier. The obligation may attach during the time prior to the vessel’s arrival to the loading port, while she is still at sea,⁵⁰ having begun maybe at the time the vessel was delivered,⁵¹ rather than merely at the time when she is loaded or departing from the loading port. Arguably, this is the period when the carrier has the opportunity and time to carry out a proper investigation and ascertain and restore any malfunction or damage that may cause

⁴⁶ See *The Makedonia* [1962] 1 Lloyd’s Rep. 316, per Hewson J, “*The voyage was, where necessary to the shipowner, divided into a series of stages, but that was in relation to the warranty of seaworthiness; it did not alter the definition of ‘voyage’. There may have been several stages, but there was only one voyage,*” p.329.

⁴⁷ As shown previously, the terms of the contract may alter the time at which the obligation of due diligence to make the vessel seaworthy starts. So that it attaches at the time of the approach of the vessel; see *The Kriti Rex* [1996] 2 Lloyd’s Rep. 171; *The Fjord Wind* [1999] 1 Lloyd’s Rep. 307, affirmed [2000] 2 Lloyd’s Rep. 191.

⁴⁸ *Maxine Footwear Co. Ltd v Canadian Government Merchant Marine* [1959] A.C. 589, p.603, per Lord Somervell (P.C). See Zaphirou, ‘Seaworthiness’, (1963) J.B.L. 221, p.225; Clarke, M., *Aspects of The Hague Rules: a comparative study in English and French Law*, (Martinus Nijhoff, 1976), p.234.

⁴⁹ Clarke, M., ‘The Carrier’s Duty of Seaworthiness under the Hague Rules’ cited as Chapter 6 in Rose, F., (ed.), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds*, (LLP, 2000), p.121.

⁵⁰ See e.g. *The Makedonia* [1962] 1 Lloyd’s Rep. 316, p.338, per Hewson J; *The Kriti Rex* [1996] 2 Lloyd’s Rep. 171, p.185, per Moore-Bick J.

⁵¹ Clarke, M., ‘The Carrier’s Duty of Seaworthiness under the Hague Rules’ cited as Chapter 6 in Rose, F., (ed.), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds*, (LLP, 2000), p.120. See *Antigoni* [1991] 1 Lloyd’s Rep. 309.

unseaworthiness, not just at the loading port but also before commencement of loading.⁵² One view is that this is a cogent argument, perhaps because it is not possible to inspect, ascertain and repair all damages during such a limited time when the vessel is alongside the jetty. Indeed, upon loading, the vessel usually has very limited time and manpower to be engaged with lengthy thorough inspections in ascertaining and rectifying defects or deficiencies.⁵³ Whilst in port, the crew are usually undertaking other tasks, which, if improperly attended, may render the vessel unseaworthy. Such tasks are the loading, trimming and cargo securing operations etc. Time allowing, the crew may also be engaged in some basic maintenance. Lifting equipment, e.g. the ship's tackle, when used for loading of cargo, must be examined at intervals not exceeding one year.⁵⁴ For commercial purposes, such examinations are usually carried out en route prior to arrival at the loading port. If, for some reason, the tests were not carried out and, as a consequence, the cargo was lost or damaged, the carrier would be liable for breach of his due diligence obligation.⁵⁵ In *The Happy Ranger*,⁵⁶ the shipowner had taken delivery of the vessel from the builder on 16 February 1998. On 11 March 1998, the vessel started its first cargo operation. During the lifting of the cargo, the hook of the crane broke and the cargo suffered serious damage. The cranes and hooks were certified by the vessel's Classification

⁵² See e.g. *The Toledo* [1995] 1 Lloyd's Rep. 40 at p.50, per Clarke J.

⁵³ According to ISM, each vessel must perform inspections, checks and maintenance repairs at regular intervals in accordance with manufacturing manuals and procedures.

⁵⁴ Lloyd's Register / P&I Club, 'Survey and Examination of Ships' Lifting Appliances', (2011) cited in <http://www.ukpandi.com/fileadmin/uploads/uk-pi/LP%20Documents/Survey%20and%20Examination%20of%20Ships'%20Lifting%20Appliances.pdf> (accessed 5.10.2014)

⁵⁵ See O.C.I.M.F., I.C.S., *The International Safety Guide for Oil Tankers and Terminals (ISGOTT)* (Witherby Publisher, 5th ed., 2006), para. 8.3.

⁵⁶ *Parsons Corporation & 6 ORS v CV Scheepvaartonderneming Happy Ranger (The Happy Ranger)* [2006] 1 Lloyd's Rep. 649. Also see *Kuo International v Daisy Shipping (The Yamatogawa)* [1990] 2 Lloyd's Rep. 39, where the investigation went back to the vessel's previous Special Survey. See, *Maxine Footwear Co. v Canadian Government Merchant Marine* [1959] A.C. 589. An acetylene torch was used to defrost scuppers in the cargo holds, which caught fire and damaged the cargo. The owner denied that they were in breach of Article III, r.1 on the ground that due diligence arose only at the beginning of loading and the voyage.

Society⁵⁷ but the shipowner failed to carry out the load tests required to ensure that the hooks were in order before the vessel's first loading. The court found that the shipowner had failed to exercise due diligence in inspecting and carrying out the tests despite such tests having been carried out one month prior to the time of loading.

One might be tempted to argue that as long as, according to Articles I(e)⁵⁸ and II,⁵⁹ the Hague/Hague-Visby Rules apply from tackle to tackle,⁶⁰ then the period '*before and at the beginning of the voyage*' does not impose any rights or duties on the carrier at any time before loading begins. This matter is outside the scope of this study, however, it suffices to say that this conclusion is contrary to common sense. If the scope of the Hague/Hague-Visby Rules was restricted to the 'tackle to tackle' period, it would mean that the carrier should be under no obligation to exercise due diligence to prepare the holds for cargo until the cargo is lifted off the jetty by the tackle of the vessel.⁶¹

It is, therefore, noteworthy to mention that first, in all of the cases governed by the Hague/Hague-Visby Rules and earlier considerations, the courts have clearly indicated that the carrier's exercise of due diligence is determined by his conduct days or months prior to the manifestation of the matter at issue in the

⁵⁷ The ship's cranes were certified by Lloyd's register. However, both cranes were not load tested to their maximum (SWL), and class certificates are not enough to prove the seaworthiness of the vessel. Testing the cranes as part of a risk assessment is an important part of the due diligence obligation to provide a seaworthy vessel. Risk assessments will be dealt with at a later stage.

⁵⁸ Article I(e) provides that "[c]arriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship."

⁵⁹ Article II provides that the Convention shall only apply to "the loading, stowing, custody, care and discharge of ... goods."

⁶⁰ From the time when the goods are loaded to the time when they are discharged from the vessel. In *Pyrene Co. v Scindia Steam Navigation Co.* [1954] 1 Lloyd's Rep. 321. Cargo was attached to the ship's tackle and was being loaded on board when the cargo fell outside the ship. It was held that the Rules applied although the goods had not crossed the ship's rail. The decision was correct, as the ship's tackle had been hooked on.

⁶¹ A similar notion is believed to be applicable under the container seaworthiness obligation of the Rotterdam Rules. For a general discussion on containers, see Chapter Six.

case. Secondly and alternatively, the period that covers the time ‘*before the voyage*’ depends on the circumstances of each case. Therefore, the standard of fitness required to be fulfilled by a prudent and careful carrier/shipowner might extend to the period well before the vessel’s arrival.⁶²

In turn, this may mean that the exercise of due diligence by the carrier could be examined by reference to a point earlier in time, which may be as far back as, or even before, the relevant contract of carriage was made.⁶³ A common example where the carrier’s obligation to exercise due diligence may attach well before the vessel’s arrival at the loading port is the carriage of perishable cargoes. For instance, grain cargoes are usually harvested in advance and obviously before the vessel’s arrival to the loading port; their forwarding and storage at the port sheds depends on the vessel’s estimated time of arrival notice. If the vessel, however, breaks down during the preliminary approaching voyage and, as a result of the ensuing delay, the cargo is damaged or lost, it is arguable that the obligation under Article III, r.1 attaches before the arrival of the vessel.⁶⁴ The aforementioned position is more applicable to charterparties⁶⁵ where the carrier is under an obligation to exercise due diligence to make the

⁶² See Margetson, N. J., ‘Duties of the Carrier’ cited as Chapter 4 in Hendrikse, L. Margetson, N. J. Margetson, N. J. (eds), *Aspects of Maritime Law: Claims under Bills of Lading*, (Kluwer Law International, 2008). Margetson reported that “*the knowledge concerning the condition of the vessel over a series of voyages can lead to the conclusion that the carrier failed to exercise due diligence to make the ship seaworthy before a specific voyage*,” p.62.

⁶³ Cooke, J. et al., *Voyage Charters*, (LLP, 3rd ed., 2007), para. 85.100.

⁶⁴ *Eridania SpA v Rudolf A. Oetker (The Fjord Wind)* [2000] 2 Lloyd’s Rep. 191; *The Kriti Rex* [1996] 2 Lloyd’s Rep. 171. A case of the Hague Rules being incorporated into a contract of affreightment not for a specific vessel but for vessels to be nominated, as to which see *The Lloyd Pacifico* [1995] 1 Lloyd’s Rep. 54.

⁶⁵ Wilson, J., *Carriage of Goods by Sea*, (Pearson, 2008). Wilson at p.13 reiterated the point raised by Mustill J in *The Hermosa* [1980] 1 Lloyd’s Rep 638, who stated that “*there are in most time charters express terms as regards initial seaworthiness and subsequent maintenance which are not easily reconciled with the scheme of the Hague Rules, which create an obligation as to due diligence attaching voyage by voyage. It cannot be taken for granted that the interpretation adopted in [The Adamastos case] in relation to voyage charters applies in all respects to time charters incorporating the Hague Rules*”, at p. 647.

vessel seaworthy while she is on her way to the loading port.⁶⁶ However, this position could, at least as a matter of practical legal sense, be extended to bills of lading, as this gives ample time to the owner to assess and correct, in advance, defects that may render him liable for unseaworthiness. Yet, it is not always the case, especially under liner voyage (e.g. carriage under a bill of lading) where the Hague/Hague-Visby Rules are applicable.⁶⁷ Thus, the carrier is obliged to supply a seaworthy ship from the commencement of loading the goods until the beginning of the voyage.⁶⁸ In *Maxine Footwear Co. v Canadian Government Merchant Marine*,⁶⁹ the vessel loaded cargo under a bill of lading incorporating the Hague Rules. Before sailing and after completion of loading, scupper pipes were found frozen and they were defrosted by means of an acetylene torch. As a result of negligent use of the acetylene torch, the insulation of the piping caught fire which spread to the entire ship, which subsequently sank. The Judicial Committee of the Privy Council ruled that the owner was liable because 'before and at the beginning of the voyage' included

⁶⁶ See *Adamastos Shipping v Anglo-Saxon Petroleum* [1959] A.C. 133. (incorporating the 1936 US COGSA) tanker to make consecutive voyages carrying cargo to different ports. The engineer employed was incompetent and, as a result, the vessel broke down in her first voyage to the loading port with further problems arising later. The House of Lords considered that, during the ballasting voyage to the loading port, the owner is under an obligation to exercise due diligence to provide a seaworthy ship, at pp.179-180.

⁶⁷ *Adamastos Shipping v Anglo-Saxon Petroleum* [1959] A.C. 133. Lord Keth of Avonholm stated that: "Taking section 3 (1) and section 4 (1) and (2) (a) by themselves, no difficulty would arise in giving them a literal and effective interpretation as between owner and charterer. Two points, however, are taken, that these provisions do not apply to ballast, or non-cargo carrying, voyages, and apply only to a voyage to or from a United States port. On the first point, of course, the Act as drawn applied only to cargo voyages because it dealt wholly with contracts of carriage under bills of lading. But ex hypothesi that limitation has gone. The Act is now being applied to a charterparty. A charterparty is a contract for the purpose of the carriage of goods by sea, and I see no difficulty in saying that a voyage in ballast is all part and parcel of and incidental to that purpose. If a chartered ship proceeds to its port of loading, it is, in my opinion, engaged in a voyage relating to the carriage of goods though it is not actually carrying goods at the time."

⁶⁸ *Maxine Footwear Co. Ltd. v Canadian Government Merch. Marine Ltd.* [1959] A.C. 589, at p.603.

⁶⁹ *Maxine Footwear Co. Ltd. v Canadian Government Merch. Marine Ltd.* [1959] A.C. 589.

the obligation to exercise due diligence during the period from the beginning of loading until the vessel sank.⁷⁰

It was explained by Carver that *“many of the cases relate to voyage charters and simply require the ship to be sea and cargoworthy for the voyage in respect of which the ship is chartered. Bills of lading issued in the liner trade may be issued at any port on the voyage and may relate to any part of the voyage the liner is performing. In such situations the duty relates only to the cargo covered by the particular bill and the voyage between the ports at which that cargo is loaded and that at which it is to be discharged. The requirement of seaworthiness as regards any particular vessel may therefore vary in respect of each of the consignments loaded on it.”*⁷¹

One can see the logic behind the application of the phrase ‘before the voyage’ in liner voyage, as being the time of actual commencement of loading. Take for an example, a refrigerated liner ship carrying cargo from port A, which must be carried at a temperature of 16°C inside the cargo holds, that is destined to port B. At port B, a different type of cargo is to be loaded and discharged at port C. However, the cargo-holds are not fit to take the new cargo from port B. The new cargo (at port B) requires an adjustment to the temperature in order to make the cargo-hold cargoworthy⁷² and thus ready to receive the cargo. This however is

⁷⁰ The ruling of the court stated that ‘before and at the beginning of the voyage’ means the period from at least the beginning of the loading until the vessel starts on her voyage. Lord Somervell of Harrow, who delivered the opinion of the Committee, made plain the words “at least” were used because the matter of precisely when the period began did not arise on the facts of the case, at p.603. See Margetson, N. J., *The system of liability of articles III and IV of the Hague [Visby] Rules*, (Paris Legal Publisher, 2008), pursuant to this decision the phrase ‘before the voyage’ relates to at least the time of actual commencement of loading, at p.39.

⁷¹ Guenter, H. and Reynolds, F. M. B., *Carver on Bills of Lading*, (2011) para 9.018.

⁷² According to Article III, r.1(c), the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to *“make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.”*

not possible until the first cargo (loaded at port A) is discharged at port B. In such a case, one can see that it is not always possible under liner voyage to exercise due diligence during the preliminary voyage, as due diligence in preparing for the second cargo is only exercisable after discharging the first cargo. In other words, the carrier is not obliged to make sure that the vessel is seaworthy while she is on her way to the loading port, as it is considered to be on its way to the discharging port for another cargo. Further, as there is no ballast voyage, it is impossible to prepare for the consequent cargo and thus the obligation does not attach before the beginning of the voyage for that particular cargo.

However, in case of a vessel chartered to make consecutive voyages, in the approach/ballast voyage the carrier might be obliged to make arrangements during the voyage to make the vessel fit. The carrier, therefore, would not be relieved from any delay in loading the cargo or in sailing as a result of failing to make these arrangements. This is to say that under consecutive voyages under a charterparty, the carrier is also under an obligation to “*ensure at the beginning of each successive voyage contemplated by the charter that the vessel was in a seaworthy condition.*”⁷³

One may, therefore, reasonably conclude that the shipowner’s inspections, maintenance and repairs that are carried out as scheduled according to requirements and standards set by the manufacturers of the various equipment and instruments on-board the ship and the regulations of the shipping industry, such as the ISM Code, SOLAS Convention, etc. form part of his duty to exercise due diligence. The diligent completion, or lack thereof, may be traced

⁷³ *Adamastos Shipping Co. Ltd. v Anglo-Saxon Petroleum Co. Ltd.* [1957] 2 Q.B. 233 (CA), at p.235.

back to a time well before the vessel proceeds to her loading port. In addition to whether the carriage is under a bill of lading or charterparty, the extent of the period 'before the voyage' should depend on the type of cargo, length of the ballast and laden voyage, and the type of vessel.⁷⁴

2.6.2 'At the beginning of the voyage' - Termination of the Obligation

In any voyage, the period of the duty ends, according to Article III, r.1, '*at the beginning of the voyage*'.⁷⁵ It should be noted that not only does the obligation of exercising due diligence to make the vessel seaworthy terminate at the '*beginning of the voyage*' but also, the vessel's unseaworthy condition under the Hague/Hague-Visby Rules is determined on the basis of whether the causal unseaworthiness occurred before or after the commencement of the voyage. Therefore, the question of when exactly the voyage starts is crucial.

Article III, r.1 probably reflects the common law rule that the carrier's obligation concludes automatically when the voyage begins. This focus on the commencement of the voyage requires parties to the contract of carriage to know the exact time the voyage starts. In a practical sense, before 'the beginning of the voyage', the carrier is required to carry out some necessary preparations related to the vessel's seaworthiness, which may, in combination or separately, be considered by the court to determine whether the obligation to provide a seaworthy vessel has been fulfilled and subsequently, whether the vessel has commenced her voyage. This would be the case if a vessel, leaving

⁷⁴ Tetley, W., *Marine Cargo Claims*, (Blais, 2008), at p.898-899. See also Carver, at p.564.

⁷⁵ *Maxine Footwear v Canadian Government Merchant Marine* [1959] A.C. 589.

her jetty (cast off), sailed to the location of an anchorage within the port limit.⁷⁶

Such an event is not unlikely to occur particularly in circumstances where the vessel is expected to encounter a hurricane; where the harbour control requests the vessel to vacate her loading jetty for another vessel; or, where the vessel casts anchor with the aim of receiving Customs' clearance⁷⁷ after leaving the berth whereas her loading, perhaps, has not been completed and will be completed whilst at anchor or at a different point within the port.⁷⁸ Alternatively, it might be the case that the vessel shifts⁷⁹ from the loading jetty to the loading buoy intending to continue loading or for other purposes, but with no intention to proceed with the voyage at sea.⁸⁰ The court will take into consideration the practicality of the preparations required before commencing the voyage and may decide that the vessel has not commenced her voyage. In circumstances where the voyage has not yet commenced, shipowners remain under a continuing duty to exercise due diligence. If damage is caused at this time, shipowners will be unable to avail themselves of the defences that would have

⁷⁶ Elements such as the type of vessel and her characteristics (size, type, ability to navigate through shallow water, manoeuvrability, etc.); the port of loading (the depth of the channel to navigate through, location of the port if river or sea port); the activity of the vessel (if at anchor, fast to the jetty or loading ship to ship, the need for harbour, or river or sea pilot); and, the matter affecting seaworthiness of the vessel (matter arising prior to sailing, such as stowage and lashing) will determine when the vessel is beginning her voyage. For example, if a vessel is at anchor outside the port limit, her voyage starts when her anchor is on board. On the other hand, if the vessel is fastened to the jetty, her voyage might start either when her lines are on board or if her pilot is away.

⁷⁷ Under the Public Health (Ships) Regulations 1979 (SI 1979/1435) (regulations 21 to 29), a vessel might be sent to anchorage for further inspections, i.e. deratting certificates.

⁷⁸ Due to draft restrictions (shallow depth of water) in some ports around the world, it is normal practice for vessels, particularly bulk carriers, to load part of the cargo alongside the jetty and the rest of the cargo when the vessel is at anchor. Furthermore, vessels are likely to change their jetty from one to another within the same port of loading for the same reason; e.g. many vessels have to carry out their loading in terminals situated off-shore due to draft restrictions. Cited in Branch, E., *Elements of Shipping* 8th ed., (Routledge Publisher, 2007), p. 204.

⁷⁹ The definition of the word 'shift' when "*said of a ship, to move from one place to another, for example from one berth to another within the same port or from anchorage to berth [or from berth to anchorage or buoy]. In a voyage charter, provision should be made as to whether the time taken to shift counts as laytime*". See Peter, R., *Dictionary of Shipping Terms*, (Informa, 6th ed., 2013).

⁸⁰ *The Willowpool* [1936] AMC 1852 (2 Cir. 1936), under the UK COGSA 1924.

been available had the voyage commenced. In *The Newport*,⁸¹ whilst the vessel was casting off her loading jetty, engineering staff had been instructed to open the steam valve for the use of the capstan in handling the mooring lines astern. Instead, the engineer opened the wrong steam valve and poured steam into the cargo hold damaging the cargo. The Ninth Circuit held that, under the Harter Act, the voyage had not yet commenced as “*the feeding of steam to the capstan for the purpose of casting off lines was an act of preparation for the voyage.*”⁸² As a result, the vessel was unseaworthy due to a failure to exercise due diligence. Thus, the carrier could not rely on the exception of error in management because “*If the negligent act of the third assistant engineer had been committed an hour later, and after the vessel was under way, it would have been a ‘fault or error in the management of the vessel,’ for which the owner would be relieved of liability under the Harter Act... The negligent act of the third assistant engineer was committed while he was endeavoring to obey an order looking to the beginning of the voyage, but the voyage had not begun.*”⁸³

Common sense dictates that in each case the issue as to whether the ‘*beginning of the voyage*’ has come to an end, depends on all of the facets of seaworthiness being fulfilled. The decision on when the vessel began her voyage will vary from case to case depending on whether all the matters that affect seaworthiness have been carried out.⁸⁴ This may explain why there is no English authority defining the moment of the ending of the ‘*beginning of the*

⁸¹ *G. Amsinck & Co. v Pacific Mail S.S. Co. (The Newport)*, 7 F.2d 452 (9th Cir. 1925).

⁸² *G. Amsinck & Co. v Pacific Mail S.S. Co. (The Newport)*, 7 F.2d 452 (9th Cir. 1925), at p.454.

⁸³ *G. Amsinck & Co. v Pacific Mail S.S. Co. (The Newport)*, 7 F.2d 452 (9th Cir. 1925), at pp. 453-454.

⁸⁴ For instance, in *The Willowpool*, it was held that the vessel is not deemed to have begun her voyage, “*until when the vessel breaks ground or leaves her moorings in complete readiness for sailing and proceeding to sea.*” 12 F. Supp. 96, 1935 AMC, at p.1298.

voyage' but rather a mere indication as to the time of sailing, which cannot be used as a general criterion to determine the termination point of the due diligence obligation.⁸⁵

All preparations that can be considered as an act of preparing the vessel for open sea might be considered necessary to make the vessel seaworthy and as long as any of those preparations have not been completed, then the voyage should not be considered to have begun.⁸⁶

The common law provides some guidance as to the time of exercising due diligence until the termination of the due diligence obligation, namely, "*the period from at least the beginning of the loading until the vessel starts on her voyage.*"⁸⁷ Nevertheless, case law on seaworthiness did not precisely turn on when the obligation ended.⁸⁸ Therefore, insurance cases and freight payable on 'sailing' provides some guidance on when the voyage should start.⁸⁹ It would be

⁸⁵ It makes it very difficult to decide on one definition especially when one has to consider other normal trade practices that are carried out at sea and after the beginning of the voyage in order to make a vessel seaworthy, which would not render her unseaworthy. For example, see *Orient Ins. Co v United S.S. Co.* 1961 AMC 1228 (S.D. N.Y. 1961), "*where a vessel may be seaworthy although ballasting is not complete at the time of sailing, if ballasting is planned to be done at sea*" as stated by Tetley, *Marine Cargo Claims*, (Blais, 2008), at f.n. 79, at p.895.

⁸⁶ In *Gilchrist Transportation Co. v. Boston Insurance Co.*, 223 F. 716, 139 (C. C. A. 1915), the vessel had been fully loaded and then shifted to a place in Duluth harbor seven miles distant. An inspection of the vessel had not been carried out and the navigation season had not opened. It was held for these reasons that the voyage had not begun and the exclusion under the Harter Act was unavailable to the owner.

⁸⁷ *Maxine Footwear Co. Ltd v Canadian Government Merchant Marine* [1959] A.C. 589, p.603.

⁸⁸ See in *Maxine Footwear Co. Ltd v Canadian Government Merchant Marine* [1959] A.C. 589. The Judicial Committee of the Privy Council held that the obligation to exercise due diligence continued over the whole of the period from the beginning of loading until the vessel sank. Also, in *The Thorsa* [1916] p.257, Phillimore LJ stated that: "*the moment when seaworthiness is to be tested is the moment when the ship leaves the harbour,*" p.263; See also *McFadden v Blue Star Line* [1905] 1 K.B. 697, "*It takes effect at the time of sailing, and at the time of sailing alone,*" p.704, per Channel J.

⁸⁹ Tetley, W., and Clevens, B., 'Prosecuting the Voyage, in Carriage of Goods by Water: A Symposium' (1971) 45 Tul. Rev. 807, where it was stated that there is "*little clear judicial authority for a definition of the commencement of the voyage,*" p.807.

prudent to discuss the authorities to give an indication of the factors used by courts to determine the commencement of the voyage.

2.7 Factors which Determine the Commencement of the Voyage - When Does the Obligation Come to an End?

In discussing this matter, it is convenient to separate the authorities on operational and legal requirements. Tetley explains that the authorities consist of two schools of thought; operational and legal requirements.⁹⁰ This does not mean that one, e.g. operational, could substitute the other in each single case.⁹¹ However, I am of the opinion that both operational and legal requirements are (at least in most cases) together necessary and the voyage cannot commence if one of them is not fulfilled. One can imagine that it would be unrealistic for a voyage to commence if one type of requirement has not been fulfilled, i.e. legal requirements but not operational.

2.7.1 Operational Requirements

The practical requirements for the commencement of the voyage were explained in *The S.S. Del Sud*,⁹² where the majority⁹³ held that “[t]he lines to the dock were fast [to the manoeuvring tug boats] not to keep her there, or to continue her stay at the wharf. They were there solely as an essential step in

⁹⁰ Tetley, W., and Clevens, B., ‘Prosecuting the Voyage, in Carriage of Goods by Water: A Symposium’ (1971) 45 Tul. Rev. 807, p.809.

⁹¹ This can be understood from Tetley’s statement that: “*Absence of potential control of shore personnel means that the vessel must be in all legal and practical respects ready to pursue the voyage*,” Tetley, W. and Clevens, B., ‘Prosecuting the Voyage, in Carriage of Goods by Water: A Symposium’ (1971) 45 Tul. Rev. 807, p.809. This means that even if one of the requirements is fulfilled, the other must still be fulfilled before the voyage can commence.

⁹² *Mississippi Shipping Co. v Zander & Co. (S.S. Del Sud)* 270 F.2d 345, 1959 AMC 2143 (5 Cir. 1959).

⁹³ *Mississippi Shipping Co. v Zander & Co. (S.S. Del Sud)*, 270 F.2d 345, 1959 AMC 2143 (5 Cir. 1959), para.34, per Hutcheson, Circuit Judge.

her navigational manoeuvring. The ship's engine was actively manoeuvring to accomplish the swing and officers and men were stationed for simultaneous undocking and departure. The ship was literally and figuratively in the sole command of the master on the bridge..." This quotation embraces two operational/practical requirements and/or preparations, which are important to be fulfilled in combination or separately depending on each case in order to determine whether the vessel is ready to commence her voyage. These are referred to below.

2.7.1.1 The Physical Process of Casting the Vessel Off (Undocking)

As part of a vessel's physical fitness and complete readiness to commence her voyage, a number of operational requirements need to be pursued to decide on commencement of the voyage.

a- Unmooring (undocking)

The vessel is not considered to have commenced her voyage if she is still fast at a dock,⁹⁴ jetty or mooring buoys or if her anchor is still touching the bottom of the sea. Once those lines or mooring ropes have been released from the jetty and tug boats are made fast, an operational requirement consisting of part of the voyage preparation process has been fulfilled. As a result, the voyage would be considered as commenced provided that all other preparation requirements

⁹⁴ See 2.7.1.1, at p.106. The Physical Process of Casting the Vessel Off (Undocking), sub-para. 'b- breaking ground and manoeuvrability', which explains that the court in *The Del Sud* decided that the vessel had commenced her voyage despite the fact that her lines were still connected to the jetty for the purpose of pivoting the vessel. In that case, the lines of the ship were connected to the shore during manoeuvring in order to assist the vessel to swing quickly (with the assistance of the tug) in a small turning radius.

have been fulfilled.⁹⁵ The test for the physical process of casting off is whether all lines of the vessel (again, not those lines which assist the vessel to manoeuvre and turn around) are taken on board. For instance, in *The Willowpool*⁹⁶ the vessel departed from a loading jetty in order to moor at a buoy in the harbour when another vessel collided with her. Later, she left the mooring point with the damage caused by the collision. The court held that when the collision occurred the vessel was moored to the buoy, thus, the voyage had not commenced until the time the vessel had taken her lines on board and left her buoys; accordingly, the vessel was held to be unseaworthy. The consequence of the finding in this case is twofold. The first is that the vessel had not commenced her voyage when she shifted from the loading dock to the buoy for further loading or customs clearance.⁹⁷ The second, is that as the carrier/shipowner had still not fulfilled all the obligations required to provide a seaworthy vessel before the beginning of the voyage and as the master had ignored the damage to his vessel prior to the commencement of the voyage, the carrier/shipowner had failed to exercise due diligence. As a result, the carrier could not use the exclusions under Article IV, r.2.

b- Breaking Ground and Manoeuvrability

In order for the voyage to be regarded as commenced, the vessel must be said to 'break ground', be able to 'manoeuvre' and 'swing around with her own power and/or by the assistance of the tug boats'.⁹⁸ If a vessel's movement is restricted,

⁹⁵ See further below for the rest of the discussed points.

⁹⁶ *The Willowpool* 12 F. Supp. 96, 1935 A.M.C. 1292 (S.D.N.Y. 1935), affirmed, 86 F.2d 1002 (2 Cir. 1936).

⁹⁷ The court in *The Willowpool* decided that "a voyage commences only when the vessel breaks ground or leaves her moorings in complete readiness for sailing and proceeding to sea." *The Willowpool* 12 F. Supp at 100, 1935 AMC at 1928.

⁹⁸ See Tetley, W., *Marine Cargo Claims*, (Blais, 4th ed., 2008), p.879. *The S.S. Del Sud* 270 F.2d 345, 1959 AMC 2143 (5 Cir. 1959).

i.e. due to draft restrictions,⁹⁹ or if she cannot swing around or is unable to manoeuvre while she is at the port of loading, the vessel is considered not to have 'broken ground' and thus cannot commence her voyage even if she has cast-off her mooring ropes. In *The Del Sud*,¹⁰⁰ the vessel struck the jetty while she was being swung around with the assistance of a tug and her lines ashore. Despite the impact resulting in damage to her side hull and water rushing into the cargo hold and damaging the cargo, the master failed to inspect the hull and sailed. The question of whether this was an error in navigation and management or failure to exercise due diligence to make the vessel seaworthy led to another question of whether or not the vessel had commenced her voyage at the time of the incident. The majority of the court ruled that the voyage had commenced at the time of impact. Their decision was in conformity with the observation of Storey J that "*the voyage commences when the ships breaks ground for the purpose of departure...*"¹⁰¹ The court explained the good seamanship pre-departure preparation to break ground and manoeuvre. The vessel could not break ground and manoeuvre "*until the ship had no further purpose at the dock. She was made ready for sea. She was being turned around for the purpose of leaving...The ship's engines were actively manoeuvring to accomplish the swing and officers and men were stationed for simultaneous undocking and departure ... what we decide is consisting with*

⁹⁹ Vessels in confined water, i.e. the Suez Canal, are restricted to navigate at certain times with certain orders in a convoy. The master has no control in the manoeuvre of his vessel whatsoever.

¹⁰⁰ *The S.S. Del Sud* 270 F.2d 345, 1959 AMC 2143 (5 Cir. 1959).

¹⁰¹ *The S.S. Del Sud* 270 F.2d 345, 1959 AMC 2143, at 2148, quoting *The Brutus*, 4 F. Cas. 490, "*The general rule of our law, like that of the civil law ... is that the voyage commences, when the ship breaks ground for the purpose of departure; and the parties have here expressly fixed it to the time of sailing,*" at p.495 (No. 2060) (C.C.D. Mass. 1815).

ancient observation of judge Story that ‘...the voyage commences, when the ship breaks ground for the purpose of departure...’¹⁰²

One might argue that the ruling in *The Del Sud* contradicts the ruling in *The Willowpool*.¹⁰³ In the former, the court regarded the voyage as commenced despite her lines still being ashore while in the latter case the court held that the voyage had not commenced as the vessel was still moored to a buoy. In *The Del Sud*, during the swinging of the vessel and while fastening the vessel to a tug to assist her undocking she had commenced her voyage. Having two lines during undocking still at the jetty is part of good seamanship practice to swing the vessel around quickly with the assistance of the tug and is very likely to happen when the vessel’s manoeuvring room is confined by shallow water or a narrow jetty. Swinging the vessel around is not possible unless some of the lines are fastened ashore. If there is no need to carry out this type of manoeuvre, there would be no need to have the lines ashore.¹⁰⁴ Accordingly, the conclusion of the trial judge that “*when the damage occurred to the Del Sud [she] had not left her moorings at Santos in complete readiness for sailing and proceeding to sea once her stern line and spring line and breast line were still made fast to the mooring facilities of the dock at Santos*”¹⁰⁵ shows that the practical matter of undocking the vessel was not considered and that due

¹⁰² *The S.S. Del Sud* 270 F.2d 345, 1959 AMC 2143 (5 Cir. 1959).

¹⁰³ *The Willowpool* 12 F. Supp. 96, 1935 A.M.C. 1292 (S.D.N.Y. 1935), affirmed, 86 F.2d 1002 (2 Cir. 1936).

¹⁰⁴ *Zander & Co v Mississippi Shipping Co. (The S.S. Del Sud)*, 171 F. Supp. 184, 192, 1959 AMC 653, 661 (E.D. La.) reversed, 270 F.2d 345 (5 Cir.), vacated, 361 U.S. 115 (1959). The court held that “*The lines to the dock were fast not to keep her there, or to continue her stay at the wharf. They were there solely as an essential step in her navigational manoeuvring. They were no less vital than the hawser to the straining tug off the starboard quarter.*”

¹⁰⁵ *Zander & Co v Mississippi Shipping Co. (The S.S. Del Sud)*, 171 F. Supp. 184, 192, 1959 AMC 653, 661 (E.D. La.) reversed, 270 F.2d 345 (5 Cir.), vacated, 361 U.S. 115 (1959).

diligence had not been exercised to provide a seaworthy vessel.¹⁰⁶ *The Del Sud* was distinguished by the majority from the previous decision of *The Willowpool*. Tetley provides a good summary of the basis on which the cases were distinguished: “*the Del Sud was proceeding to sea while the Willowpool was merely shifting*”,¹⁰⁷ as the latter was prevented by the harbour authority to leave the port at night. Thus, the master did not have control over his vessel and remained under the control of the port authority.

2.7.1.2 The Command or Control of the Vessel

The vessel must be under the sole command of her master in order to be able to commence her voyage. It will not be enough that the vessel is ready in all other respects to commence her voyage should she not be under the complete control and command of her master and crew.¹⁰⁸ In other words, if the vessel is, for instance, restricted by the instructions of the port state control and of the pilot, she will not be ready to navigate and get underway solely on the command of her master, despite maybe being partially under the command of the master.¹⁰⁹ The control of navigational matters, i.e. control by the port authority, will restrict, in effect, the master from being in command or control of

¹⁰⁶ *Zander & Co v Mississippi Shipping Co. (The S.S. Del Sud)*, 270 F.2d 345, 349, 1959 AMC 2143, 2147 (5 Cir.), vacated, 361 U.S. 115 (1959). The majority opined that the view of the trial court in deciding that the voyage had not commenced was highly artificial.

¹⁰⁷ Tetley, W., and Clevens, B., ‘Prosecuting the Voyage’, 45 Tul. L. Rev. (1970-1971). 807, p.808.

¹⁰⁸ Before the vessel’s lines are untied from the moorings, or the anchor leaves the bottom or under the command of the pilot, the carrier or jetty personnel still have potential authority over the vessel. See Hakan, K., *The Carrier’s Liability Under International Maritime Conventions - The Hague, Hague-Visby Rules, and Hamburg Rules*, (The Edwin Mellen Press, 2004), p.106.

¹⁰⁹ The trial judge (Hutcheson) in *The S.S. Del Sud* suggested that the vessel had not commenced her voyage as she was still under the control of the port authority and any negligent acts would still constitute an unseaworthiness event. See *The S.S. Del Sud*, 270 F.2d at 355, 1959 AMC pp.2156-2157. The majority concluded that: “*The ship was literally and figuratively in the sole command of the master on the bridge.*” *The S.S. Del Sud*, 171 F. Supp. 184, 192, 1959 AMC 653, 661 (E.D. La.) reversed, 270 F.2d 345 (5 Cir.), vacated, 361 U.S. 115 (1959).

his vessel. Similarly, the voyage has not started if the ship has not sailed but instead is merely drifting off the loading jetty. If the master has returned to land to get the papers signed and completed, in such a case the voyage has not yet started owing to, *inter alia*, the vessel not yet being under the control of her master.¹¹⁰

However, some ports impose restrictions on vessels as to the decision of when the sailing of the vessel takes place; it is not determined by the fact that the vessel has cast off from the loading jetty. This is true, even if all the requirements of exercising due diligence have been fulfilled; i.e. adequate in bunker, tackles and crew. For example, by a regulation of the port, vessels may not be permitted to go out to sea after darkness but merely to cast off the loading jetty and anchor within the port limit. The physical process of casting off would not be considered to be the beginning of the sailing/voyage nor would it give the master the full control to sail to the open sea. This gives the port authority some control over the vessel so that she is not under the full control of her master to commence the voyage. In an insurance policy case, *Sea Insurance Co. v Blogg*,¹¹¹ the vessel left the loading jetty fit to encounter the perils of the sea with all means. However, due to a regulation that restricted the vessel from sailing at night, the master's motive was to move the vessel away from the jetty to prevent the crew from going ashore and getting drunk. So, he took the vessel to anchor within the port limit with the intention of commencing

¹¹⁰ See below, *Hudson, Hudson and Forster v Bilton* (1856) 6 E. & B. 565.

¹¹¹ *Sea Insurance Co. v Blogg* [1898] 2 Q. B. 398. This case must be contrasted with *Price v Livingstone* (1882) 9 QBD 679, where the vessel had cast off, in order to drop her anchor outside the 'commercial limit' of the port, with no intention to return. The Court of Appeal held that on the grounds that the vessel had dropped anchor outside the commercial port limit and had no intention to go back to the loading port, she must be taken to have finally sailed for the purpose of commencing her voyage from the loading port, affirming the decision of the lower court by Lopes J.

the voyage the following day. The vessel on the following day weighed anchor and proceeded to sea. She was subsequently lost in the course of her voyage. This raised the question of whether the loss was covered by a policy of insurance. Having regard to the terms of the policy, the question depended on whether the vessel had commenced sailing. The Court of Appeal held that the vessel did not commence her voyage until the following day after leaving the anchorage position and thus the insurance policy attached on that day rather than the day she left her jetty. This case suggests that even if the vessel has fulfilled all the requirements of seaworthiness and sailed from the loading jetty, as long as there is some control by the port authority over the vessel, the master does not have full control over the vessel, and therefore, the voyage must not be regarded as commenced. This is “[because] *it must be a sailing which is a commencement of the voyage*”¹¹² equal to the situation “*when she [the vessel] leaves the wharf without being ready for the voyage by reason of not having all her crew on-board or some other reasons, that may be evidence that she did not then commence her voyage.*”¹¹³

Applying this approach to a carriage of goods case, if a vessel collides or touches the sea bottom and water rushes in damaging the cargo, the carrier will be liable for failure to exercise due diligence for not making the vessel seaworthy and he cannot exclude liability by relying on the navigation and management exclusion. This is because at the time of shifting the vessel from the jetty to the anchorage, the vessel was still under the restriction of port regulations; not under the control of her master. Therefore, the voyage should not be considered as commenced.

¹¹² *Sea Insurance Co. v Bagg* [1898] 2 Q. B. 398, p. 400, per Vaughan Williams LJ.

¹¹³ *ibid.*

2.7.2 Legal Requirements¹¹⁴

Apart from her physical readiness, a vessel must be also legally able and ready to commence her voyage. A vessel may be ready from a physical perspective, namely she is under the control of her master and her lines have been or are about to be taken on-board, yet she may still not be fit or ready to pursue the voyage due to a legal impediment. For example, this may be the case when the vessel is unable to sail without firstly being granted port clearance, customs clearance,¹¹⁵ a certificate of health,¹¹⁶ a hatch sealing certificate,¹¹⁷ a certificate of fitness to proceed to sea,¹¹⁸ a shipper's (cargo) declaration as required under the IMO BC Code,¹¹⁹ or indeed any permission of a similar type.

The voyage does not commence until all legal requirements have been fulfilled. Furthermore, the carrier shall remain under the obligation to continuously exercise due diligence to provide a seaworthy vessel if the vessel is detained

¹¹⁴ Regulation 15 of the Merchant Shipping (Safe Manning, Hours of Work and Watchkeeping) Regulations 1997 (SI 1997/1320) provides that an authorised person may inspect any non UK-flagged ship in UK waters. If he finds a seaman on-board a vessel who is not holding an appropriate certificate or if the master is unable to provide adequately rested persons for the first watch at the commencement of the voyage and for subsequent relieving watches, the vessel may be detained.

¹¹⁵ Section 6 of the Merchant Shipping Act 1995 provides that a customs officer must not grant a clearance or transire for any ship until the master has declared to him the name of the nation to which he claims the ship belongs, i.e. the Flag State. Also, failure to carry valid statutory documentations, i.e. SOPEP, will cause difficulties in port clearance. See MacLachlan, M., *The Shipmaster's Business Companion*, (The Nautical Institute, 2nd ed., 2004), p.271.

¹¹⁶ Regulation 8 of the Public Health (Ships) Regulations 1979 (SI 1979/1435) gives power to a medical officer to require a ship to be brought to, and if necessary moored or anchored, at a safe and convenient place for medical inspection.

¹¹⁷ A hatch sealing certificate may be issued by specialist hatch-sealing operatives after compartments have been sealed to prevent unauthorised entry following loading or fumigation.

¹¹⁸ A Certificate of Fitness may be issued by a marine Administration at a loading port State to certify that insofar as the stowage of the cargo conforms to the appropriate regulations or approved practice, the vessel is fit to proceed to sea. It may be required to obtain outwards clearance from a customs officer.

¹¹⁹ When carrying hazardous solid bulk cargo, e.g. coal, there are certain requirements that must be complied with, including transportable moisture limit (TML), estimated stowage factor (SF), actual sulphur content etc. In order to obtain the requisite information, samples of the cargo will need to be taken to the laboratory for testing, which might result in a delay as regards granting of the relevant certificates.

owing to a failure of the carrier to exercise due diligence in some other respect. For example, if a vessel is detained¹²⁰ due to a failure to comply with documentation relating to manning or proper crew certification, or a failure by the master to provide evidence of adequately rested crew for the first watch at the commencement of a voyage and for the subsequent relieving watches. The vessel will be set free only if the carrier/shipowner exercises due diligence by taking remedial action in respect of the above failures.

In *Thompson v Gillespy*,¹²¹ a contract of carriage (charterparty) was made between the plaintiff owner and the defendant charterer. The vessel was lost after casting off three miles from the loading jetty, while she was waiting for clearance papers from customs, bills of lading to be signed and preparation of the shrouds and cables for sailing. The defendant pleaded that the owner had sent the vessel to sea in an unseaworthy state. Given that the departure papers of the vessel had not been completed, the court held that the vessel had not sailed but merely gone into the roads awaiting the ship's papers.

It was said, regarding the importance of papers in determining the commencement of the voyage, that "*the completeness of the [the clearing of the ship's] papers is one of the most common tests of the commencement of*

¹²⁰ If an authorised person finds one of the following deficiencies: a failure of any seaman, required to hold an appropriate certificate, to have a valid appropriate certificate or a valid exemption from that requirement; a failure to comply with the safe manning document; a failure of navigational or engineering watch arrangements to conform to the requirements specified for the ship by the competent authority of the Flag State; an absence on a watch of a person qualified to operate equipment essential to safe navigation, safe radio communications or the prevention of marine pollution; or, an inability of the master to provide adequately rested persons for the first watch at the commencement of a voyage and for subsequent relieving watches, he must give written notification to the master, and in the case of a non UK-flagged ship, he must also give written notification to the nearest maritime, consular diplomatic representative of the Flag State. Regulation 16 of the of the Merchant Shipping (Safe Manning, Hours of Work and Watchkeeping) Regulations 1997 (SI 1997/1320) provides that when any of these deficiencies are found and there is a consequential danger to persons, property or the environment, the ship may, after notification to the master, be detained.

¹²¹ *Thompson & Others v Gillespy* (1855) 5 E & B 209.

sailing.”¹²² This was said in *Hudson v Bilton*,¹²³ where, after the vessel had cast off from port and was drifting waiting for custom-papers clearance, she struck ground and sustained damage, and was then put into a different port for repairs. Despite the fact that the vessel’s fitness was not discussed in relation to the awaited papers, the court came to the conclusion that, as long as the paper had not been received, the vessel was not to have commenced her sailing. Tetley has rightly indicated that as long as the vessel is under the control of the port authority, i.e. waiting for customs clearance, then the vessel is not in a legal respect ready to pursue the voyage.¹²⁴

Carver argues¹²⁵ that the ‘*beginning of the voyage*’ is not a point in time but is instead a period of time encompassing the process of entering a new action. This notion arguably implies a voyage by stages. For example, the stage from laying at the port to the river stage, which is between the port of loading and the open sea, would be part of the beginning of voyage and thus part of the time in which the carrier/shipowner is obliged to exercise due diligence. The consequence of such an interpretation is the creation of the problem that the

¹²² *Hudson, Hudson and Foster v Belton* (1856) 6 E. & B. 565, p.569, per Ellis. It was held that, even though the vessel had cast anchor, because the vessel’s papers had not been completed, the vessel had not yet started the voyage. As a result, the defendant was not liable to pay freight.

¹²³ *Hudson, Hudson and Foster v Belton* (1856) 6 E. & B. 565.

¹²⁴ Tetley, W., and Cleven, B., ‘Prosecuting the Voyage’, 45 Tul. L. Rev. (1970-1971). 807, p.808.

The authors are against the approach of the court in *The John Miller*, 113 F. Supp. 357, 1952 AMC 1945 (S.D.N.Y.), *affirmed per curiam*, 205 F.2d 679 (2 Cir.), cert. denied, 346 U.S. 866 (1953). In this case, the demise charter sought the cargo-interest’s share of general average expenses when the vessel had stranded while leaving her jetty prior to receiving customs clearance, which was expected at anchor. The court held that, for the purpose of COGSA, the voyage had begun and the exception of navigation error was available.

¹²⁵ Colinvaux, R., *Carver: Carriage by Sea*, (Steven & Sons, 13th ed., 1982,), p.359-360. Cf. *The President Monroe* [1972] 1 Lloyd’s Rep. 385, at p.386 (US District Court).

notion of doctrine of stages (as explained above) is applied even though it is not applicable under the Hague/Hague-Visby Rules.¹²⁶

Furthermore, it is not persuasive to say that the *'the beginning of the voyage'* is determined by a period of time; i.e. the duration of the cast-off process¹²⁷ when she "had no further purpose at the dock or port" so the vessel could be put to sea. Then, the voyage is no longer beginning but the vessel is underway. The commencement of sailing must be determined on the satisfaction of the condition of sailing of the vessel; namely, if she starts from her port of loading ready for sea and intending there and then to commence the voyage. This principle is explained by Parker B. in *Roelandts v Harrison*,¹²⁸ stating that "*according to several cases on the insurance law, the sailing is determined to be that period of time when the vessel breaks ground, being at that time fully fit for sea, having the cargo on-board which she intends to carry, with a competent crew, and having permission to leave by having the Custom House clearance on-board.*"¹²⁹ However, the process of casting-off for the purpose of vacating the dock when, at the same time, there are potential outstanding operations,¹³⁰ which may restrict the vessel from completing her legal or contractual obligations, such as shifting to another dock or to the anchor or even still

¹²⁶ The doctrine of stages may no longer apply under Article III, r.1. *The Makedonia* [1962] 1 Lloyd's Rep. 316, 329-330. See, Cooke, J., *Voyage Charters*, (3rd ed.), 2007), at para.85.104.

¹²⁷ Clarke, M., 'The Carrier's Duty of Seaworthiness under the Hague Rules' cited as Chapter 6 in Francis Rose (ed.) *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds*, (LLP, 2000), p.121.

¹²⁸ *Roelandts v Harrison* (1854) 23 L.J. Ex. 169.

¹²⁹ *Roelandts v Harrison* (1854) 23 L.J. Ex. 169, p.173, per Parker B.

¹³⁰ The direction that is given from the Harbour Master may sometimes oblige the vessel to leave the port without complete securing and lashing for the cargo, but to carry out such operations, e.g. securing and lashing, at anchor while awaiting for the declaration papers of the 'Custom House clearances on board', *Roelandts v Harrison* (1854) 23 L.J.Ex. 169, p.173, per Parker B. Also in some occasions, the vessel is to be loaded from several points within the same port at different jetties. For example, in the United States case *American Mail Line v United States* (1974) 377 F.Supp. 657 (Wash W.D.), it was held that a vessel, which loaded at six different points in the land-locked Puget Sound, did not complete loading and begin the voyage until the sixth and last departure.

preparing her engine and/or not even being under her master's command,¹³¹ should not be understood as the ending of the '*beginning of the voyage*' and certainly not until such time as the completion of the process and the fulfilment of all the requirements.¹³²

In addition to that which has been previously explained with regard to the exercise of due diligence in respect of cargoworthiness preparation (e.g. trimming and securing of cargo), there may be other operational measures and requirements that have to be fulfilled that may directly or indirectly impact on the end of the termination of the obligation of the carrier in exercising due diligence to make the vessel seaworthy.¹³³ In other words, the vessel needs to be fully under the control of her master and crew and *[a]bsence of potential control of shore personnel means that the vessel must be in all legal and practical respects ready to pursue the voyage.*¹³⁴ Such "*practical and legal requirements constitute the fitness of the vessel to render her able to proceed with the voyage.*"¹³⁵ Therefore, the voyage should not be considered to have begun when one of the requirements/preparations are incomplete and, consequently, she might not be considered to have completed her due diligence obligations. This can be understood from the language of Channel J in the *McFadden v Blue Star Line*,¹³⁶ stating that, "*There is, of course, no warranty at the time the goods are put on-board that the ship is then ready to start on her voyage; for*

¹³¹ See Tetley, W., and Clevén, B., 'Prosecuting the Voyage', (1971) Tul. L. Rev. 807. It was concluded that: "the law ought to require continued alertness of the carrier in discharging its due diligence obligation until the vessel is fully underway," at p.809. E.g. *Mississippi Shipping Co. v Zander & Co. (S.S. Del Sud)* 270 F.2d 345, 1959 AMC 2143 (5 Cir. 1959).

¹³² The situation here should not be understood to apply the doctrine of stage that is under the common law. This is because the loading situation in the given hypothetical example has not been completed.

¹³³ Tetley, W., and Clevén, B., 'Prosecuting the Voyage' (1970-1971) 45 Tul. L. Rev., 807, p.809.

¹³⁴ Tetley, W., and Clevén, B., 'Prosecuting the Voyage' (1970-1971) 45 Tul. L. Rev., 807, p.809.

¹³⁵ *Ibid.*

¹³⁶ *McFadden v Blue Star Line* [1905] 1 K.B. 697, p.704, per Channel J.

while she is still loading [and until she fulfils all her obligations connected with seaworthiness] *there may be many things requiring to be done before she is ready to sail.*"¹³⁷ Especially if those things, arising prior to sailing such as trimming, stowage and lashing as long as they affect the seaworthiness of the vessel, are likely to be considered as matters connected in time to the period before or at the beginning of the voyage.¹³⁸

Finally, Clarke argues¹³⁹ that the criterion by which the dividing line between the period in which the carrier is liable for negligence in matters of navigation and management of the vessel by virtue of Article III, r.1 and the period of the voyage in which he is not liable for negligence in such matters by virtue of Article IV, r.2(a) is to be the time that marks the end of the '*beginning of the voyage*'. This is true, however, his view that "*once the vessel casts off, the carrier/shipowner will have no control over the action of his master and crew*" does not justify that this period in time marks the end of the '*beginning of the voyage*'. His view might have been relevant in historical times prior to the latest technological and management developments in the shipping industry. In light of current technological advancements, including modern communications technology and the introduction of risk management techniques through the adoption of the ISM Code,¹⁴⁰ vessels today are able to stay in contact with their owners through the Designated Person Ashore (DPA). The carrier/shipowner can engage in the day-to-day operation of the vessel by contacting the crew on

¹³⁷ *Ibid.*

¹³⁸ See *Exercise Shipping Co. Ltd v Bay Maritime Lines Ltd (The Fantasy)* [1992] 1 Lloyd's Rep. 235. A stowage (non-seaworthy) case; however, the court gave an indication that some matters, if they affect the vessel's seaworthiness, are probably matters arising before or at the beginning of the voyage. See also Cooke, J., *Voyage Charters*, (3rd ed., 2007), para. 85.104.

¹³⁹ See Clarke, M., *Aspects of The Hague Rules: A comparative study in English and French Law*, (Martinus Nijhoff-The Hague, 1976), pp.234-235.

¹⁴⁰ See Alexander von Ziegler, 'The Liability of the Contracting Carrier', (2009) 44, Texas Int. L. J., 329-348, p.338.

board his vessel at any time via the DPA for matters or decisions, which may affect the seaworthiness of the vessel. The application of such technology can be seen in the following example. Survey certificates are important for the operation of the ship, i.e. without them, the vessel may not be allowed to enter the discharge port.¹⁴¹ Due to the time limit for the vessel's stay at the port of loading, certificates may be issued some time after the vessel has been surveyed. Therefore, vessels may leave dry-dock without certificates, knowing that those certificates, due to advanced technology, will be faxed or emailed to the ship prior to entering the port of discharge.

In conclusion, from a contractual point of view, the duty to exercise due diligence to provide a seaworthy vessel imposes on the carrier/shipowner a continuous alertness at the loading port until the vessel has fulfilled all the practical and legal requirements to commence her voyage 'at the beginning of the voyage'.¹⁴² This may make the situation more complicated as the carrier's/shipowner's attention for the purposes of the due diligence obligation is not restricted merely to the preparation and completion of the loading (legal and operational/practical) but also extends further. For instance, repairing a defect

¹⁴¹ Certificates, such as a class certificate, are required by SOLAS and are very important for the trading of ships. However, they are not certificates of seaworthiness but may be used as proof of seaworthiness. See Mandaraka-Sheppard, A. *"In the absence of valid certificates or documents, or if there are clear for believing that the condition of a ship or of its equipment or its crew does not substantially meet the requirements of a relevant instrument, a more detailed inspection should be carried out."* Cartner, A. et al., *International Law of the Shipmaster* (2009), at para C 7.1, *"Once a notice of arrival is sent by the master to the United States' authorities, information on the vessel and its past behaviors and the persons aboard is evaluated and entered into a decisional formula purported to assess risk to the United States from the vessel in safety, environment and security,"* at para. E7.1.

¹⁴² See Greenwood, E. C. V. 'Problems of negligence in loading, stowage, custody, care, and delivery of cargo; errors in management and navigation; due diligence to make seaworthy,' 45 Tul. L. Rev. (1970-1971), 790, at p.805. The same view was discussed in Tetley, W., and Clevon, B., 'Prosecuting the Voyage', 45 Tul. L. Rev. (1970-1971). 807, p.809.

before the commencement of the voyage even if it had emerged just before the beginning of the voyage.

In light of the above-suggested indicating factors regarding whether the voyage is commenced and the obligation is terminated, one might rightly suggest that the common law would still influence the interpretation of the termination of the obligation. Authorities on the commencement of the voyage do not specifically limit the meaning of the 'beginning' to a particular point in time, such as the raising of the anchor or the time when the vessel sails from the loading port. In deciding whether the voyage is commenced, a court should consider the fulfilment of the last requirement (whether legal or operational) where it is said to be 'the beginning of the voyage'.

2.9 Conclusion

The obligation to exercise due diligence to provide a seaworthy vessel should be carried out 'before and at the beginning of the voyage'. The carrier is only liable for unseaworthiness that relates to this period of time. The carrier could be responsible for unseaworthiness caused from not having exercised due diligence during an extensive period before the voyage or contract starts. However, the obligation terminates at the beginning of the voyage. Under the current law, this creates problems. There is no single definition that can be used as a benchmark to determine the commencement of the voyage. However, if all the authorities regarded above are taken into consideration, as at least a matter of practice than law, one can suggest that the operational and legal requirements must be fulfilled to decide on the starting of the voyage and thus the termination of the obligation of seaworthiness. Regardless of whether

navigational error exception should be removed, and whether the exercise of due diligence should continue, the line that should determine the commencement of the voyage should be the test of whether the carrier has fulfilled all his obligations to provide a seaworthy vessel, reflected by his exercise of due diligence and the master should have full control and command of his vessel. This would reflect the full readiness of the vessel to pursue the voyage, having fulfilled all of her legal and operational requirements.

Part II: The Obligation under the Rotterdam Rules¹⁴³

2.10 The Relevant Provisions in the Rotterdam Rules

Since the adoption of the Hague and the Hague-Visby Rules and particularly during recent decades, there have been a number of legal and technological changes. First, trends and developments in the shipping industry concerning safety, quality, environmental or manning standards have all led to the adoption of new, or amended and strengthened, regulations and codes, such as SOLAS, MARPOL, STCW 95 and similar. Secondly, revolutions in marine and transport technology and modern communications have undoubtedly affected all sectors of the shipping industry, being either liner shipping through containerisation or tramp vessels and various specialised vessels, such as tankers. This has brought about changes to trade patterns, speeds, fitness requirements, cargo handling requirements and turnaround times at port. In this respect, much criticism has been voiced by the industry arguing that the existing legal framework is not attuned to the practical and commercial demands of our modern era.

Through its working groups, UNCITRAL has established a new set of provisions in order to update and modernise the legal regime that currently governs the carriage of goods by sea; the Rotterdam Rules. Despite potentially differing implications as regards the provisions of the rules in various jurisdictions, the provisions contained in these Rules certainly have an impact on the carrier's obligation to exercise due diligence to provide a seaworthy vessel. Countries

¹⁴³ The words 'duty' and 'obligation' are used interchangeably in this thesis.

that are likely to enjoy greater changes are those that will directly replace the regime of the Hague/Hague-Visby Rules with the new regime of the Rotterdam Rules.¹⁴⁴

This Chapter will only address direct changes, whereas the following chapters will deal with indirect changes.

Article 14 provides as follows:

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

- (a) Make and keep the ship seaworthy;*
- (b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and*
- (c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.*

As previously explained, under the Hague/Hague-Visby Rules, the carrier is bound to exercise due diligence in providing a seaworthy vessel only ‘before and at the beginning of the voyage’.¹⁴⁵ Although the rule does not identify exactly when the obligation commences and ceases, it has been interpreted to cover, “*the period from at least the beginning of the loading until the vessel starts in her voyage.*”¹⁴⁶ The Rotterdam Rules, however, impose the additional

¹⁴⁴ See Sturley, M. et al., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters, 2010), p.8.

¹⁴⁵ Article III, r.1 of the Hague/Hague-Visby Rules.

¹⁴⁶ *Maxine Footwear Co. Ltd v Canadian Government Merchant Marine* [1959] A.C. 589, p.603.

and more onerous obligation on the carrier to exercise due diligence to make the vessel seaworthy before and throughout the entire voyage.¹⁴⁷

2.11 The Language of Article 14

Article 14 of the Rotterdam Rules uses the same familiar language used in the corresponding provision of the Hague/Hague-Visby Rules.¹⁴⁸ There has been a common understanding and consensus in the shipping industry for the language to be kept the same.¹⁴⁹ However, non-substantive changes to the language have been used to describe the three elements of seaworthiness. For instance, while Article III, r.1(b) of the Hague/Hague-Visby Rules inclusively provides for the carrier's duty to 'man ... the ship', Article 14(b) of the Rotterdam Rules uses gender-neutral language to include the carrier's duty to 'crew ... the ship',¹⁵⁰ which is effectively the same. However, words, such as 'keep' and 'container'¹⁵¹ appearing in Article 14 of the Rotterdam Rules are likely to change the obligation to exercise due diligence to provide a seaworthy vessel compared to the obligation under the current regime. Changes are generally explained under paragraph 2.14 and its subsequent subparagraphs.

Since Article 14 of the Rotterdam Rules is based on Article III, r.1 of the Hague/Hague-Visby Rules, case law relating to the latter will assist in determining the extent of the due diligence obligation to provide a seaworthy vessel under the new regime.

¹⁴⁷ Because the carrier is now "...bound before, at the beginning of, and during the voyage by sea to exercise due diligence to: (a) Make and keep the ship seaworthy..." (emphasis added).

¹⁴⁸ See Berlingieri, F., 'Carrier's Obligations and Liabilities' (Part II - The Work of the CMI, 2008), an electronic resource available online: www.cmi2008athens.gr/sub3.5.pdf.

¹⁴⁹ See 12th Session Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003), UN doc. No. A/CN.9/544 (2003), para.149.

¹⁵⁰ See 12th Session Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003), UN doc. No. A/CN.9/544 (2003), para.148.

¹⁵¹ Container seaworthiness is discussed in detail in Chapter Six.

2.12 The Standard and Timing of the Obligation

As with the Hague/Hague-Visby Rules, the seaworthiness obligation is not absolute; the carrier need only 'exercise due diligence' to provide a seaworthy vessel. This obligation must be exercised before and at the beginning of the voyage. Post-sailing, the carrier is under an obligation to exercise due care, in relation to the cargo, pursuant to Article III, r.2. The language of Article 14 of the Rotterdam Rules confirms that the obligation is not absolute and that the carrier's due diligence obligation should be exercised before and at the beginning of the voyage, and continue to be exercised post-sailing.

2.13 The End of the Obligation

Article 14 does not define when the period during which the obligation must be exercised comes to an end. One approach is that the duty comes to an end when the voyage by sea is completed. However, when the voyage by sea comes to an end is also unclear and the Rotterdam Rules do not define this. This might give rise to different interpretations in respect of the term 'voyage by sea', which in turn determines the end of the obligation. One interpretation could be that the voyage is coming to an end when the vessel enters the limits of the discharge port. Another interpretation, however, might be that the voyage is regarded to have come to an end when the discharge of cargo has been completed.¹⁵² Nikaki¹⁵³ concludes that the term 'voyage by sea' must be

¹⁵² See the same concern as expressed by Berlingieri F., 'Basis of Liability and Exclusions of Liability' [2002] LMCLQ 336, p.339; Baatz, Y. et al., *The Rotterdam Rules: A Practical Annotation* (Informa, 2009), para.14.02.

¹⁵³ Nikaki, T., 'The obligations of carriers to provide seaworthy ships and exercise care' cited as Chapter 4 in Thomas, R. (ed.), *A new convention for the carriage of goods by sea - The Rotterdam Rules*, (Lawtext Publishing Limited, 2009), at p.107.

interpreted to include the discharge of cargo from the vessel. Supportive of such a conclusion, there is no reason for distinguishing between the loading of the cargo, which falls within the scope of Article 14, and its discharge. Nonetheless, this conclusion is not completely sound. The loading operation is by implication included in the exercise of due diligence because, by definition or necessity, it is performed at the stage 'before' the beginning of the voyage. It would be difficult to embrace the discharging operation within Article 14. It is obvious that the duty to discharge is being added to the 'care of cargo' Articles under both regimes.¹⁵⁴ Consequently, moving such operations to the seaworthiness obligation under Article 14 is unnecessary.¹⁵⁵ The draftsmen have maintained a similar wording, i.e. '*before and at the beginning of the voyage*', but have added the words 'and during' as regards the voyage. Therefore, an inference could be drawn that the obligation terminates with the arrival of the ship at its destination and does not continue until the completion of the discharge.¹⁵⁶

Pursuant to paragraph (c) of Article 14, the obligation concerning the cargoworthiness will be fulfilled at the time of the "*reception, carriage and preservation of the cargo*".¹⁵⁷ Due to the multimodal scope of the Rotterdam Rules, i.e. door-to-door, the discharge operation of containerised goods, for example, might take place at a time and in a location beyond the carrier's control.¹⁵⁸ As a result, where a carrier supplies a container, his obligation to

¹⁵⁴ Article 13 of the Rotterdam Rules and Article III, r.2 of the Hague/Hague-Visby Rules.

¹⁵⁵ The Rotterdam Rules acknowledge certain practices where the parties can agree on who is in charge of performing the loading, handling, stowing or unloading of the goods, i.e. the shipper or the consignee.

¹⁵⁶ Berlingieri, F., 'Basis of liability and exclusions of liability' [2002] LMCLQ 336, p.339.

¹⁵⁷ Article 14(c) of the Rotterdam Rules.

¹⁵⁸ One might argue that the discharge of a container from the vessel is the time that the obligation comes to an end. This notion is true only when the container is not supplied by the carrier, as in this case, the container is regarded as 'goods'. The discharge of a container from the vessel is considered as the discharge of the contractual cargo. On the contrary, if the container is supplied by the carrier, then the discharge of the container, pursuant to Article 1(26),

provide a cargoworthy container will be indirectly extended to the land leg of the journey.¹⁵⁹ Such an interpretation would exceed the scope of Article 14, which imposes an obligation for the period before, at and during the 'sea voyage'. The extension of the obligation to be exercised throughout the voyage removes the problem of identifying the point at which the voyage commences, which would otherwise bring the obligation to an end. However, the problem has shifted to the port of discharge, as one now needs to identify the point at which the sea voyage ends. The solutions,¹⁶⁰ referred to above and adopted by courts to solve such problems under the current law, do not practically apply to the problem of determining the port of discharge under the Rotterdam Rules. A suggestion for avoiding the uncertainty of when the obligation ends is that the parties could contractually agree on this point. In practice, if not as a matter of law, the moment at which the termination of the due diligence obligation could be agreed upon in the contract. As the Rotterdam Rules acknowledge, some practices¹⁶¹ are based on the parties contractually agreeing that cargo-interests (shipper or consignee)¹⁶² should be in charge of performing the loading, handling, stowing or unloading operations. The carrier, in such a case, is completely relieved of

is not considered as discharge of cargo for this purpose, as this would be contrary to the definition provided by the Rotterdam Rules. See the introduction regarding the supply of the container at para. 5.1.1, at p.330

¹⁵⁹ As per the words of Lord Esher MR, the discharge operation might take place beyond the point of the ship's rail. For example, around the area of port, warehouse or beyond. He stated that the shipowner: "*has performed the principal part of his obligation when he has put the goods over the rail of his ship; but I think he must do something more - he must put the goods in such a position that the consignee can take delivery of them,*" in *Petersen v Freebody & Co.* [1895] 2 Q.B. 294, p.297.

¹⁶⁰ See para. 2.7, at p. 104 for the indicated factors which determine the commencement of the voyage

¹⁶¹ I.e. Free In, Out Stowed (FIOS). See the UN Committee on International Trade Law [UNCITRAL], Working Group III on Transport Law, Report of Working Group III (Transport Law) on the Work of its 21st Session, para. 46, UN Doc. A/CN.9/645 (Jan. 14-25, 2008).

¹⁶² The Rotterdam Rules, Article 13(2).

being involved with the discharge operation.¹⁶³ The carrier, hence, is relieved of exercising his due diligence obligation under Article 14 should the end of the seaworthiness obligation be decided by the court to also be the end of the discharge operation.

Finally, as mentioned above, on some occasions, the starting of the voyage (or sailing with the intention to commence the voyage) is ascertained by finding out whether the vessel has left the commercial limits of the loading port.¹⁶⁴ Thus, it could be argued, by analogy, that the voyage comes to an end once the vessel has entered the 'commercial limits' of the port of discharge.

2.14 Differences between Exercising Due Diligence Before and During the Voyage

We have examined above the requirements of the obligation to exercise due diligence for the period '*before and at the commencement of the voyage*' and the courts' considerations in this respect. Insofar as the due diligence obligation '*during*' the voyage is concerned, it might be presumed that the period of the carrying voyage is another factor for the court to consider when assessing the required standard of due diligence by the carrier, in addition to those factors that relate to the carrier's obligation to exercise due diligence before and at the beginning of the voyage. In other words, in determining whether reasonable measures of due diligence were pursued by the carrier in question, regard must

¹⁶³ To the extent that a similar agreement is actually agreed and expressed in the contract of carriage and not only indicated by way of negligence clauses introduced in the bills of lading. See von Ziegler, A., 'The Liability of the Contracting Carrier', (2009) 44 Texas Int. Law J., 329-348, p.337. Also, it must be said that very clear words might shift the duty and the risk of discharge on to the charterer. Cf. *Ballantyne v Paton* [1912] S.C. 246.

¹⁶⁴ See the above point on *Price v Livingstone* (1882) 9 QBD. 678. The point of commercial limits is important for both the insurance policy (see *Roelandts v Harrison* (1854) 23 L.J. Ex. 169, p.173), as well as the advance freight payable upon sailing (see *Price v Livingstone* (1882) 9 QBD. 678). This was an important matter to decide whether the vessel had commenced sailing.

be given to the location of the vessel, whether the unseaworthiness occurred in the port or at sea, and what application of care a diligent carrier, commonly referred to as the 'prudent owner', would exercise when rendering the vessel seaworthy.¹⁶⁵ However, the actions required and the application of due diligence to provide a seaworthy vessel are arguably different when the vessel is navigating at sea from those when she is at port.¹⁶⁶ The Working Group of the Rotterdam Rules did not consider to what extent the exercise of due diligence 'during' the voyage would differ from the exercise of due diligence 'before and at the beginning of the voyage'.¹⁶⁷

It is convenient to consider the duty to exercise due diligence to 'keep' the vessel seaworthy separately to the same duty during the voyage.

2.14.1 The Effect of the Extension of the Obligation and the Application of the Duty to 'make' the Vessel Seaworthy 'before and at the beginning of the voyage'

The on-going obligation might have a bearing on the steps which a diligent carrier should take before his vessel commences its voyage. For instance, the history and records of the particular vessel may indicate that her machinery had frequently broken down during the preceding voyages.¹⁶⁸ This might place an

¹⁶⁵ Mankabady, S., 'Comments on the Hamburg Rules' cited as Chapter 2 of Mankabady, S., (ed.), *The Hamburg Rules on the Carriage of Goods by Sea* (Sijthoff-Leyden, A. W. / Boston, 1978), p.56.

¹⁶⁶ Baatz, Y. (ed.), *The Rotterdam Rules: A practical annotation* (London: Informa, 2009), pp.39-40.

¹⁶⁷ See 12th Session Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003), UN doc. No. A/CN.9/544 (2003), para.149.

¹⁶⁸ If a vessel suffers a particular type of breakdown, special diligence must be exercised. In other words, a breakdown will be judged in light of the normal of exercise of due diligence where special vigilance must be given to that particular area. See Tetley, W., *Marine Cargo Claims*, (Blais, 4th ed., 2008), p.901.

extra burden on the carrier before the commencement of the voyage to reasonably equip his vessel with the tools and spare parts necessary for the repair of such breakdowns should it occur during the sea passage. He may also need to take reasonable steps to avoid potential unseaworthiness during the voyage in relation to defects that would be impossible to repair due to a lack of experts and access to tools.¹⁶⁹ Morris LJ, in *The Muncaster Castle*, said “[w]hen it is being considered whether due diligence to make a ship seaworthy has been exercised, it may be helpful to ascertain the history and the record of the ship and then proceed to consider (inter alia) whether there have been such steps and such procedures as a prudent and careful carrier would take and follow.”¹⁷⁰

Therefore, the obligation imposed on the carrier to exercise due diligence to provide a seaworthy vessel for the entire duration of the voyage will, most likely, increase the activities of the carrier whilst the vessel is in the port, in order for him to demonstrate that he has exercised due diligence.¹⁷¹ The increase of activities may affect the way the carrier has to plan his voyage bearing in mind the on-going obligation. For example, if the vessel requires spare parts necessary for repair or maintenance that might affect her seaworthiness and such spare parts are not available at the loading port, in order to discharge his obligation, the carrier must diligently make a plan at the loading port to arrange to call at the nearest port where such spare parts can be supplied. This principle is analogous to the requirement of the supply of bunkers before and at the beginning of the voyage. If the carrier, for any reason, cannot obtain bunkers at the port of loading, he is obliged to make proper arrangements to bunker his

¹⁶⁹ For a detailed discussion, see para. 2.16.4, at p. 158.

¹⁷⁰ *Riverstone Meat Co. v Lancashire Shipping Co. (The Muncaster Castle)* [1961] 2 Lloyd’s Rep. 553, at p.561, per Morris L.J.

¹⁷¹ Clarke, M., *Aspects of the Hague Rules: A comparative study in English and French Law*, (Martinus Nijhoff, 1976), p.229.

vessel at another port or various ports along the planned route. For example, in *The Makedonia*,¹⁷² “... the obligation on the shipowner was to exercise due diligence before and at the beginning of sailing from the loading port to have the vessel adequately bunkered for the first stage to San Pedro and to arrange for adequate bunkers of a proper kind at San Pedro.”¹⁷³ On the other hand, “the standard of care depends upon prudent practice in each case”.¹⁷⁴ Thus, the ongoing duty, as extended beyond the commencement of the voyage, might impose extra activities for the fulfilment of the due diligence obligation, such as fitting extra equipment,¹⁷⁵ supplying the vessel with a more experienced crew,¹⁷⁶ pursuing extra tests,¹⁷⁷ or supplying the vessel with extra spare parts¹⁷⁸ (lack of

¹⁷² *The Makedonia* [1962] 1 Lloyd's Rep. 316.

¹⁷³ *ibid.* at p.329. See also *Northumbrian Shipping Co. Ltd v E. Timm & Son Ltd* [1939] A.C. 397, [1939] 2 All E.R. 648 (H.L.), where the carrier's failure, before the voyage began, to provide sufficient bunkers to get the vessel to its first bunkering port was held to be a failure to exercise due diligence resulting in liability and depriving the carrier of the exception provided by the Canadian Hague Rules.

¹⁷⁴ *Waddle v Wallsend Shipping Co. Ltd* [1952] 2 Lloyd's Rep. 105, at p.130, per Mr Justice Devlin. The sinking of the vessel was due to a negligent failure to provide a seaworthy vessel and raised the question of to what extent an employer should go to somebody skilled to advise him about a technical matter of this sort.

¹⁷⁵ *The Irish Spruce* [1976] 1 Lloyd's Rep. 63. Magistrate Goettel stated that: “Having found that the ship's officers would have made use of the beacon had they known of its availability [prior to the vessel sailing], and that this would have provided vital navigational information that would have prevented the stranding, the unseaworthy condition was an effective cause of the loss,” at p.74. See also *The Marion* [1983] 1 Lloyd's Rep. 156, where the vessel was found unseaworthy because of out of date charts.

¹⁷⁵ Nikaki, T., ‘The Fundamental duties of the carrier under the Rotterdam Rules’, (2008) 14 JIML 512, p.519.

¹⁷⁶ *Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd (The Hong Kong Fir)* [1961] 1 Lloyd's Rep. 159, “the owners were informed that, as the engines were very old [and] it was necessary to engage an engine room staff of exceptional ability, experience and dependability.”

¹⁷⁷ *Parsons Corporation & Others v CV Scheepvaartonderneming Happy Ranger, (The Happy Ranger)* [2006] 1 Lloyd's Rep. 649, p.663 at para.65. Gloster J stated that: “the defendant [the shipowner] appreciated the fact that the hooks had not been proof tested, and that there were no certificates to that effect; there should, and could, have been a test of the hooks before the loading took place. If that had happened, the defect would have been discovered, since it would have tested the hooks to at least 110 per cent of their SWL, which it is common ground was greater than the weight of the load at the time that the hook broke.” It was indicated in para. 4.4.1, point (b), at p.304, that the shipping industry, by means of SOLAS, has already imposed obligations on the carrier, which might increase the activity required by due diligence. The new regulations, such as risk assessment in para.1.2.2.2 of the ISM Code, requires the carrier to carry out tests on their vessels before entering into service and after dry docking; testing standards of the relevant international convention (SOLAS, MARPOL, etc.) as specified in MSN 1734 (regulation 6(2)(a). As far as British ships are concerned, it is imposed by the Merchant Shipping (Marine Equipment) Regulations 1999 (SI 1999/1957) to implement Council Directive

which may necessitate the interruption of the voyage and the vessel calling at a repair port). Under the new regime, the court might consider the carrier's failure to supply the vessel with extra spare parts (i.e. additional parts to those required to satisfy the obligation prior to sailing), as a failure to exercise due diligence, which renders the vessel unseaworthy if the carrier relies on the fact that the vessel could probably call at a repair port in case of a failure. In general, an inference can be drawn that the more likely a risk of unseaworthiness causing loss, the more the court would expect the carrier to exercise due diligence by taking preventative action before and at the beginning of the voyage,¹⁷⁹ with regard at least to defects repairable only at port and defects that would need special expertise and spare parts which are not available on board during the voyage.¹⁸⁰ On the other hand, given that the court allows the carrier to arrange for an intermediate port of call for bunkering purposes, one might argue that the on-going obligation would, by analogy, allow the carrier the flexibility of delaying the exercise of due diligence because this obligation has now been extended to include the period after the commencement of the voyage.

96/98/EC on Marine Equipment ('the Marine Equipment Directive'), (as amended by Commission Directive 98/85/EC). The Marine Equipment Directive lists in Annex 1, equipment for which detailed internationally agreed testing standards exist; and in Annex 2, equipment for which no detailed internationally agreed testing standards exist. An additional survey is an inspection, either general or partial according to the circumstances, to be made after a repair resulting from investigations or whenever any important repairs or renewals are made. The scope of each of these surveys, i.e. the particular items surveyed, inspected and/or tested, depends on whether the ship is a passenger ship or a cargo ship, and is described in Marine Shipping Notice (MSN) 1751.

¹⁷⁸ *Guinomar of Conakry and Another v Samsung Fire & Marine Insurance Co. (The Kamsar Voyager)* [2002] 2 Lloyd's Rep. 57. The vessel was found to be unseaworthy for supplying the wrong spare parts, which caused the engine to breakdown, and the cargo claimant recovered after suing the carrier for his general average contribution.

¹⁷⁹ *The Assunzione* [1956] 2 Lloyd's Rep. 468, p.487, per Willmer J. Activities to safeguard the vessel and cargo from heavy seas.

¹⁸⁰ This could be described as a relative notion, whereas in other situations, it would be easier to spot a defect at sea. For instance, the operation of the main engine. This type of situation has, though relative, an obvious impact on the extension of the seaworthiness obligation under the Rotterdam Rules.

It should be borne in mind that the extended obligation does not give the carrier the choice to postpone the exercise of due diligence or to exercise it sometime after the period 'before and at the commencement of the voyage'. For instance, the carrier is not given, through the temporal extension of the duty, the luxury to postpone, until after the commencement of the voyage, activities to the vessel such as the supply of chart corrections or surveying works or activities relating to the preparation of cargo holds¹⁸¹ or securing the cargo.¹⁸² These are known to be customarily part of the obligations¹⁸³ to be complied with before the commencement of the voyage. The extension of the obligation merely means that the due diligence obligation that relates to the period before and at the commencement of the voyage will remain so (albeit with increased activities) and, in addition, will extend all relevant due diligence activities for the period after the commencement of, and for the entire, voyage. In the example given above relating to charts, the carrier might be required by the extended obligation imposed by the Rotterdam Rules to equip his vessel, before the beginning of the voyage, with the latest electronic chart technology and correction procedures that will provide the vessel with instant chart corrections even when the vessel is at sea.¹⁸⁴ From another perspective, the workload on

¹⁸¹ *Tattersall v The National Steamship Co. Ltd*, (1883-84) LR 12 Q.B.D. 297. *Cheikh Boutros Selim El-Khoury and Others v Ceylon Shipping Lines Ltd (The Madeleine)* [1967] 2 Lloyd's Rep. 224. *The Tres Flores* [1973] 2 Lloyd's Rep. 247. *Mediterranean Freight Services Ltd v BP Oil International Ltd (The Fiona)* [1994] 2 Lloyd's Rep. 506.

¹⁸² *Jindal Iron and Steel Co. Ltd and Others v Islamic Solidarity Shipping Co. Jordan Inc. (The Jordan II)* [2005] 1 Lloyd's Rep. 57. *Renton (G.H.) & Co. v Palmyra Trading Corporation (The Caspiana)* (H.L.) [1956] 2 Lloyd's Rep. 379; [1957] A.C. 149.

¹⁸³ *Gilroy, Sons & Co. v Price & Co.* [1893] A.C. 56. Lord Herschell L.C., p.63. *Hogarth v Walker* [1899] 2 Q.B. 401.

¹⁸⁴ See Nicholas, A., 'The duties of carriers under the conventions; care and seaworthiness' cited as Chapter 6 of Thomas, R. (ed.), *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List, 2010), para.6.14; See Eun Sup Lee, 'The Changing Liability System of Sea Carrier and Maritime Insurance: Focusing on the Enforcement of the Hamburg Rules', (2002) 15 *Translational Law*, 241-255, "The extension of the obligation of seaworthiness provides a compromise between the historical considerations that ocean-going carriers have been afforded due to the high risks involved and the amount that those risks have been mitigated by

the ship's officers caused by the extension of the obligation *en route*, which places the carrier under a constant obligation in terms of keeping the charts updated,¹⁸⁵ may cause an increase in the carrier's due diligence activities at the outset of the voyage.¹⁸⁶ These increased activities may take the form of training the crew and familiarising them with the electronic chart corrections before the vessel commences her voyage.¹⁸⁷

On the contrary, if the unseaworthiness could be cured during the voyage without causing delay or damage to the vessel and/or the cargo, the carrier might be held to have discharged his obligation. This is true if it can be shown that in practice it is not necessary to carry out the relevant exercise of due diligence at the time before and at the beginning of the voyage. In *Moore v Lunn*,¹⁸⁸ the vessel left the loading port with a cargo of wooden logs carried on deck and the crew had not secured the logs before leaving the berth, as the vessel had to sail for a period downriver before getting out to the open sea. Mr Justice Bailhache ruled that the vessel was not unseaworthy when she commenced her river leg but the vessel would be rendered unseaworthy on

improvements in ocean technology, education and communications.", at p.243; See Eun Sup Lee, 'The Changing Liability System of Sea Carrier and Maritime Insurance: Focusing on the Enforcement of the Hamburg Rules', (2002) 15 *Translational Law*, 241-255, p.247. 247.

¹⁸⁵ The current practice, as explained in *Grand Champion Tankers Ltd v Norpipe A/s and Others (The Marion)* [1984] A.C. 563 (H.L.), p. 578, per Lord Diplock, is to "ensure that all charts and navigational publications are regularly corrected in accordance with the information contained in the *Weekly Admiralty Notices to Mariners* [which are received at the port of call]." However, the Rotterdam Rules, if adopted, might change such practices, so as to enforce the carrier to adopt the system of electronic chart corrections before it becomes compulsory. As a result, such a system will be required in order to allow the carrier to exercise due diligence in keeping up to date charts and publications even during the voyage. It will no longer be necessary to wait for the charts to be updated at the next port of call where the update is usually received.

¹⁸⁶ See Spencer, C., 'Keep careful watch', *Maritime Risk International*, (11th Nov. 2011). Spencer stated that: "*The technology has to be implemented in a planned and structured way and there are considerable risks if it is not fully understood and not introduced systematically. Things must not be rushed, which means that training should begin well before the legal commencement date and allow officers to become familiar and confident with the equipment.*"

¹⁸⁷ This might be an argument against the above explained point that the Rotterdam Rules have solved the problem of when the voyage begins on which the obligation ends.

¹⁸⁸ *Moore and Another v Lunn and Others* (1923) 15 *L.L. Rep.* 155. *Hedley (Pauper) v The Pinkney & Sons Steamship Company Limited* [1894] A.C. 222.

starting the ocean leg. It is also possible that a shipping practice, if reasonable, might influence a court when deciding on the issue of exercising due diligence. For example, in *The Al Taha*,¹⁸⁹ a time-chartered vessel on her voyage from Portsmouth to Izmir diverted from her course to take bunkers and refit one of her cargo booms at Boston. She ran aground in the course of leaving the berth at Boston. The owners claimed for a general average contribution from the cargo-owner who contended that the vessel was not seaworthy at the commencement of the voyage and the deviation to refit the boom was unreasonable. Mr Justice Phillips¹⁹⁰ held that

“the boom was not necessary to render the vessel seaworthy at the commencement of the voyage. It was reasonable to plan to deviate to collect the boom en route rather than to wait for the weather conditions to permit delivery at Portsmouth. This mode of performance was, in my judgment, within the liberty afforded by Article IV r.4.”

The court, in deciding whether the carrier had discharged his duty to exercise due diligence before and at the commencement of the voyage, bearing in mind the on-going obligation, will take into consideration the behaviour of a prudent carrier, in accordance with shipping practice at the time of the incident. This is so only if such practice is not unreasonable; does not cause unreasonable delay to the vessel; or, is not necessary for the loading port or voyage operations but merely necessary for the discharging port operations.¹⁹¹

¹⁸⁹ *Lyric Shipping Inc. v Intermetals Ltd. and Another (The Al Taha)* [1990] 2 Lloyd's Rep. 117, per Phillips J.

¹⁹⁰ *Lyric Shipping Inc. v Intermetals Ltd and Another (The Al Taha)* [1990] 2 Lloyd's Rep. 117, per Phillips J, p.128.

¹⁹¹ *The Kamsar Voyager* [2002] 2 Lloyd's Rep. 57.

2.14.2 The Effect of the Duty to 'keep' the Vessel Seaworthy After the Commencement of, and During, the Voyage on the Required Activity and Standard of Due Diligence - Differences in the Due Diligence Obligation Between 'before' and 'during' the Voyage

Although the duty to exercise due diligence to provide a seaworthy vessel for the period of the sea passage is, in one way, similar to the present obligation relating to the period 'before and at the beginning of the voyage', it nevertheless varies in a significant practical way.¹⁹² The obligation of due diligence is arguably different when the vessel is at the port from when she is at sea. For instance, if there is a defect in the holds, it is obvious that repairs must be made when the vessel is at port, otherwise the carrier will be held to be in breach of the obligation of due diligence. At sea, however, whether a due diligence action is required of a reasonable carrier¹⁹³ will depend upon several factors¹⁹⁴: (i) the nature of the defect; (ii) the possibility of causing damage to the cargo; and, (iii) access to the necessary facility to remedy the defect. Factors on the basis of which cases were decided¹⁹⁵ will be referred to in the discussion below.

2.14.2.1 The Nature of the Defect

¹⁹² Sturley, M. F. et al., *The Rotterdam Rules: The UN Convention on Contracts for International Carriage of Goods Wholly and Partly by Sea*, (Thomson Reuters, 2010), p.85.

¹⁹³ *Northern Shipping Co. v Deutsche Seereederei GmbH and Others (The Kapitan Sakharov)* [2000] 2 Lloyd's Rep. 255, p.266, per Auld J.

¹⁹⁴ Diamond, A., 'The Rotterdam Rules', (2009) LMCLQ 445, p.470; See von Ziegler, A., 'The Liability of the Contracting Carrier', (2009) 44 Texas Int. L.J., 329-348, p.338. See also Delebecque, P., 'Obligations of the Carrier' cited as Chapter 4 in von Ziegler, A. et al. (eds.), *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Wolters Kluwer, 2010), p.88; See also von Ziegler, A., 'The Liability of the Contracting Carrier', (2009) 22 Texas I.L.J., p.329; Berlingieri, F., 'Basis of Liability and exclusions of Liability', (2002) LMLCQ 336, p.339.

¹⁹⁵ Those factors relevant to the obligation of due diligence before the commencement of the voyage will be referred to here.

The seriousness of the consequences resulting from a particular kind of defect will have an impact on the standard of the action and the amount of care required to be taken. Clearly, a defect such as rust on the vessel's bridge can be treated more lightly than rust in the cargo hold. In *The Amstelslot*, Lord Devlin¹⁹⁶ concluded, as regards a defect of the engine gear, that "[what] *has to be balanced is in the one scale the extreme unlikelihood of there being any crack to be found and in the other scale the serious damage and loss that would occur if there was a crack.*"

It might be true that the consequence of a defect on a vessel, her machinery or a container that leads to unseaworthiness, is the same in many cases, i.e. the vessel will be deemed unseaworthy, and thus reflects the same basic standard of care. In other cases, however, depending on the type and length of the contract of carriage, the nature of the cargo, the type of the vessel, etc., there may be a greater impact.¹⁹⁷

2.14.2.2 The Possibility of Causing Damage to the Cargo

Inspections are made regularly and pursuant to the shipping industry's standards and practices. Certain visual inspections may be adequate to

¹⁹⁶ *Union of India v N.V. Reederij Amsterdam* [1963] 2 Lloyd's Rep. 223, at p.235.

¹⁹⁷ A defect might result in the carrier being liable for damage and/or termination of the contract. The Court of Appeal in *Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q. B. 26 (CA), has classified the obligation of seaworthiness as an 'innominate term'. The criterion adopted when determining the right to terminate a contract of carriage for unseaworthiness. However, the consequence of the unseaworthiness before loading the cargo might have a lesser effect on the carrier than the consequence of unseaworthiness when the cargo is on-board and suffers damage. For example, *The Madeleine* did not carry a deratting certificate which was required by port state control and for that reason the port authority refused *The Madeleine* to enter in order to discharge her cargo. The vessel had arranged to be delivered to the charterer by May 10th but the certificate of deratting would not be granted until May 12th. The charterer refused the charter because the vessel was not delivered ready prior to the cancellation date. The court held that the carrier failed to deliver the vessel in a seaworthy condition by the delivery date. *Cheikh Boutros Selim El-Khoury v Ceylon Shipping Lines (The Madeleine)* [1967] 2 Lloyd's Rep. 224

discharge the due diligence obligation. Porter J observed that “*I cannot myself believe that in every case it is obligatory upon a ship’s officer on the commencement of a voyage to go and tap every rivet to find if it has a defect or not*”.¹⁹⁸ However, if normal regular routine inspections and examinations indicate or raise the carrier’s suspicion that something would be likely to make the vessel unseaworthy, then a further examination is required. For example, it was agreed in *The Amstelslot*¹⁹⁹ that if a survey of engine machineries indicates that there is more corrosion or pitting than normal, then a further advanced method of testing, e.g. magnaflux testing, is necessary to discharge the obligation of due diligence.²⁰⁰ Similarly, the history and/or the class records of a vessel, which may indicate a possibility of failure, will ascertain the required action(s) that a diligent carrier should take.²⁰¹ Events increasing the likelihood of an incident taking place, such as adverse weather²⁰² or a preceding collision,²⁰³ might be regarded as matters increasing the amount of the required due diligence actions. The more likely that a danger will be encountered during the

¹⁹⁸ *Brown v Nitrate Producers S.S. Co.* (1937) 58 Ll. L. R. 188, p.191; *Carnfield Bros. v Tatem S.N. Co.* (1939) 64 Ll. L. R. 264, p.270; *M.D.C Ltd. v N.V. Zeevaart Maatschappij “Beursstraat”* [1962] 1 Lloyd’s Rep. 180.

¹⁹⁹ *Union of India v NV Reederij Amsterdam (The Amstelslot)* [1963] 2 Lloyd’s Rep. 223. The vessel had broken down because of a crack. A normal inspection could not identify the problem. The owner argued that an examination should have been carried out to reveal the defect. However, the test that had been performed by the surveyor was adequate to discharge the duty of due diligence.

²⁰⁰ Courts may not always require extra precaution to detect, for example, a crack. A balance has to be made between the seriousness of the damage and the likelihood of the crack occurrence. Lord Devlin in *Union of India v NV Reederij Amsterdam (The Amstelslot)* [1963] 2 Lloyd’s Rep. 223, p.235.

²⁰¹ See Clarke, M., *Aspects of The Hague Rules: A comparative study in English and French Law*, (Martinus Nijhoff-The Hague, 1976), p.227.

²⁰² *The Bunga Seroja* [1999] 1 Lloyd’s Rep. 512, p.527, per McHugh J, “*If the ship is expected to sail through an area of sea which is renowned for its severe weather, appropriate precautions must be taken to ensure that the ship is fit to undertake that voyage both in respect of the ship itself and the stowage of the cargo. The carrier must exercise due diligence at the start [and during the voyage as for the ongoing obligation under the Rotterdam Rules] to make the ship seaworthy in the light of the anticipated weather conditions.*”

²⁰³ *The Assunzione* [1956] 2 Lloyd’s Rep. 487, p.487, per Willmer J. A vessel after a casualty must receive extra caution such as superintendence.

voyage, the more care that is expected from the carrier in order to forestall it.²⁰⁴ However, the standard of due diligence under the current law will, arguably, be different to that under the Rotterdam Rules. In *The Australia Star*,²⁰⁵ the defective rivets and butts in the fuel oil tanks at the commencement of the voyage resulted in a leakage when the vessel was exposed to the stresses of the high seas. The vessel was thus unseaworthy. Nonetheless, the shipowner was discharged from liability because due diligence in inspecting a defect is judged in light of the shipbuilding and shipping industry standards and knowledge at the time in question.²⁰⁶ The case implies that, under the new regime, the obligation to carry out extra examinations for a defect that might cause damage is extended to the entire voyage. In other words, if the defect was not apparent and the extra examination was not required before the commencement of the voyage, it would then be required during the voyage, provided that such a diligent examination is feasible during the voyage. To summarise, what was good enough before and at the beginning of the voyage may well be inadequate if experience has shown that during the voyage or at an intermediate port, the vessel needs further examination. During the voyage, when the vessel changes places and perhaps type of operations, the associated risk factors²⁰⁷ also change. This is why under the new regime, the ongoing due diligence obligation becomes important. A defect that is not

²⁰⁴ *The Assunzione* [1956] 2 Lloyd's Rep. 487.

²⁰⁵ *The Australia Star* (1940) 67 Ll. L. Rep. 110.

²⁰⁶ See para. 4.5.2, at p.312 on shipping standards where it is noted that the shipping industry regulation that relates to seaworthiness, though not adequate, has become more advanced and demanding.

²⁰⁷ Perils of the sea are different to the perils of a port or river. See *Great China Metal Industries Co. Ltd v Malaysia International Shipping Corp Berhad (The Bunga Seroja)* [1999] 1 Lloyd's Rep. 512, p.517, per Gaudron, Gummow and Hayan JJ, stating that the vessel's due diligence standard in providing a seaworthy vessel is to be assessed according to the voyage under consideration. See e.g., *The Gudermes* [1991] 1 Lloyd's Rep. 456, pp.472-474; [1993] 1 Lloyd's Rep. 311, p.324, where the vessel was unseaworthy due to a lack of capacity to heat the relevant oil cargo for the voyage.

discoverable in the port but is discoverable at sea triggers the due diligence obligation of the carrier afresh, once the defect was discovered or ought to have been discovered.

2.14.2.3 What is Required in the Circumstances Depends Upon Access to the Necessary Repair Facility

Repairability through the use of spare parts either on board the vessel or remotely available and reasonably obtainable at the nearest supply station or port, or access to a repair facility,²⁰⁸ is one of the factors that should be taken into account when deciding upon the amount of the required activity that is adequate to discharge the due diligence obligation. It must be borne in mind that the maintenance, inspection and repair at sea is limited by the availability of spare parts and equipment as well as the ability of the crew. If a defect, repairable with the use of limited resources on board, manifested during the voyage and was not repaired, the carrier is most likely to be held as not having exercised due diligence in relation to the particular defect. On this point, Berlingieri stated that “[t]he degree of diligence that is “due” must be determined on the basis of the circumstances. During the voyage, only the master and the crew are available to correct any unseaworthiness that arises during the voyage”.²⁰⁹ However, if the case required the vessel to obtain spare parts or expert technicians, the required action(s) for the discharge of the due diligence

²⁰⁸ Document A/CN.9/510 - *Report of the Working Group on Transport Law on the work of its ninth session* April 2002, p.15 taken from <http://daccessdds.un.org/doc/UNDOC/LTD/V02/541/91/PDF/V0254191.pdf?OpenElement> on 21 Nov 2011. The Working Group III stated: “However, it was suggested that the degree of diligence would or should depend on the context, to the effect that, for example, the duty of the carrier would be different depending on whether the vessel was at sea or in port.”

²⁰⁹ *Report of the Fifth Meeting of the International Sub-Committee on Issue of Transport Law*, (London 16 - 18 July 2001), Yearbook 2001, p.296.

obligation is to call at the nearest supply station or port,²¹⁰ provided that the ensuing delay would be reasonable. In other words, if loss, damage or delay is avoidable by exercising due diligence whilst at sea, then the carrier would be liable if he did not exercise it. In the pre-Hague/Hague-Visby Rules case of *Worms v Storey*,²¹¹ the vessel was chartered for a voyage with a cargo of coal. She was seaworthy at the beginning of the voyage but damage occurred during the voyage, which could have been repaired during the voyage. The repair was not effectual and part of the cargo was lost. The court held that the carrier was liable in damages to the cargo-claimant. The court's proposition as regards the required activity and the need to exercise reasonable care during the voyage, which, for all material purposes is equated to the exercise of due diligence, was the following "*Suppose, [during the voyage] a leak had sprung in the side of the vessel in such a position, that by lightening it the leak would be above water, if the master had an opportunity of repairing the leak, he would not be justified in throwing the cargo overboard*".²¹²

The above three considerations suggest that the standard of due diligence during the voyage is the same standard of due diligence before the beginning of the voyage; its application depends on the differences between the two periods.²¹³ This may raise the question as to whether or not a defect which manifests after the beginning of the voyage but which is not repairable during the voyage would result in a less favourable finding for the carrier under the Rotterdam Rules as compared to the Hague/Hague-Visby Rules. It is highly

²¹⁰ Due to the availability of new communication equipment, the master can arrange for spare parts or a repairer from the nearest port of call.

²¹¹ *Worms v Storey* [1855] 11 EX. 427.

²¹² *Worms v Storey* [1855] 11 EX. 427, at pp.428-429, per Pollock B.

²¹³ See Sturley, M. et al., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters, 2010), p.85.

likely that the same test applied by the English courts in deciding a vessel's seaworthiness would be used to decide whether the carrier has exercised due diligence. Possibly, the test to be applied for the on-going due diligence obligation under the Rotterdam Rules would be "... *would a prudent shipowner, if he had known of the defect, have continued the voyage without affecting any possible repairs?*"²¹⁴ In order to decide whether, in this context, the carrier has discharged his obligation, the court will examine the conduct of the prudent carrier in relation to the surrounding circumstances of each case. How should the carrier behave in keeping the vessel seaworthy? In other words, if a defect were to manifest during the voyage, how should due diligence be exercised?

2.15 Practical Implications of the Extension of the Due Diligence Obligation to Keep the Vessel Seaworthy

It is always possible for a vessel, whilst *en route* to her destination, to suffer a mechanical failure or a problem with her equipment, even if the requisite due diligence is exercised before or at the commencement of her voyage. Where the actual safety of the vessel, and consequently, that of the cargo, is endangered, it is the master's duty, if possible, to save the vessel by removing the cause of danger.²¹⁵ The officers and crew on board may be able to repair

²¹⁴ The test was first introduced by *Carver on Carriage of Goods*, (18th ed.). The test was then applied to many cases, e.g. *McFadden v Blue Star Line* [1905] 1 K.B. 697, at 703; *M.D.C. Ltd v NV Zeevaart Maatschappij* [1962] 1 Lloyd's Rep. 180. The test is "*Would a prudent owner have required that it (the defect) should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking.*" See Nicholas, A., '*The duties of carriers under the conventions: care and seaworthiness*' cited as Chapter 6 of Thomas, R., *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd's List, 2010), para. 6.14.

²¹⁵ See the Common Law examples below at pp.143-144.

the vessel, provided that the required spare parts²¹⁶ are available on board.²¹⁷ However, it may not be possible for the crew to repair the vessel and render her seaworthy until she reaches a port of repair. It is important here to remind oneself that the obligation of seaworthiness is not a strict one. What is required of the carrier is to exercise *due diligence* to provide a seaworthy vessel.²¹⁸ In other words, the carrier is not under an obligation to provide a vessel fitted with sound working machinery that never breaks. It is also important to remember that, in this respect, the vessel must be equipped with an adequate number of spare parts to support her everyday operations and to rectify any possible defects that occur, as a lack of such tools and equipment would render her unseaworthy.²¹⁹

The form of action to be taken by the carrier in the fulfilment of the extended obligation of due diligence, which, by necessity, will involve instructions to, and action by, the vessel's master and crew when the vessel is at sea, depends on the circumstances of each case. This is a completely new area and the matter, therefore, will be left entirely for the courts to decide whether, on a case-by-case basis, the reaction by the crew and the carrier to a defect encountered during the voyage was adequate to discharge the carrier's due diligence

²¹⁶ Spares and repair equipment must be provided for life-saving appliances, for their components and for other equipment and machineries which are subject to excessive wear or consumption and which need to be replaced regularly (Regulation 84(4) OSR; no equivalent provision in SPSR). See *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719, where the judge ruled that the number of walkie-talkies used on-board was not enough for a vessel the size of *The Eurasian Dream*.

²¹⁷ The vessel is properly equipped and supplied for the expected duration of the voyage in terms of a sufficient and competent crew, navigational equipment and supplies, stores, provisions and spares, bunker fuel, fresh water, etc. *Project Asia Line Inc v Shone (The Pride of Donegal)* [2002] EWHC 24; [2002] 1 Lloyd's Rep. 659, p.674, per Andrew Smith J. (insufficient spare parts); *The Kasmar Voyager* [2002] 2 Lloyd's Rep. 57.

²¹⁸ UN Committee on International Trade Law, Report of Working Group III (Transport Law) on the Work of its 12th Session, Oct. 6-17, 2003, UN Doc. A/CN.9/544, Report of the 12th session of UNCITRAL, para. 149.

²¹⁹ *The Pride of Donegal* [2002] 1 Lloyd's Rep. 659 (insufficient spare parts); *The Kasmar Voyager* [2002] 2 Lloyd's Rep. 57; *The Marion* [1983] 1 Lloyd's Rep. 156 (inadequate charts); *The Irish Spruce* [1976] 1 Lloyd's Rep. 63.

obligation in keeping the vessel seaworthy. However, it is pertinent and convenient at this juncture to examine some hypothetical scenarios and see the potential differing conclusions or interpretations that courts may arrive at in dealing with the issue as to whether or not, under the assumed scenario, due diligence was adequately exercised by the carrier. Our inquiry will deal with four potential scenarios which involve (a) a defect repairable at sea; (b) a repairable defect which causes unreasonable delay; (c) a defect repairable only temporarily; and, (d) a defect repairable only if the vessel is at port. It goes without saying that the assumption in each of these cases is that the defect was not discoverable by the exercise of due diligence before and at the commencement of the voyage.

2.16 Practical Aspects of Remedying Unseaworthiness after the Commencement of the Voyage

2.16.1 First Scenario: A Repairable Defect

A repairable defect, such as leakage, that manifested during the voyage was detected in one of the cargo holds. If the master had instructed the crew to try their best to remedy the defect and, as soon as reasonably practicable, the defect had been remedied, then the carrier would most probably be held to have discharged his obligation to exercise due diligence to keep the vessel seaworthy without unreasonable delay or expense to the various interests involved.²²⁰ This is clear in the words of Scrutton LJ²²¹ who stated that “[a]s /

²²⁰ The contract of carriage may contain an express term imposing on the owner the duty to maintain the vessel in a seaworthy condition. Also, the obligation under maintenance clauses is not necessarily identical to the ongoing obligation under the Rotterdam Rules. However, the carrier is still required to execute any repairs which may be necessary to maintain her in a seaworthy state; see *Golden Fleece Maritime Inc and Another v ST Shipping and Transport Inc.*

*understand the authorities, a ship is not unseaworthy where the defect is such that ... remedied on the spot and in a short time by materials available".*²²²

However, whether the defect is repairable or not, there might be some further actions for the crew to take in this respect which, if not taken, might lead to an inference of lack of due diligence. The crew and the carrier are under a duty to use skill and diligence to mitigate the consequences of such a defect,²²³ e.g. keeping the cargo holds free of water by pumping water out. In other words, if a defect or water leakage through a fractured pipe becomes apparent, the crew, along with the repair of the defect, should exercise due diligence to minimise the consequences of such unseaworthiness.²²⁴ In order to prevent water damaging other cargo, it follows that if a defect manifests itself during the voyage, the crew and the carrier must exercise due diligence to preserve the undamaged cargo as well as to repair the defect, i.e. to take proper action to avert or minimise the loss. This is clear in the words of Pollock who stated that "*suppose the cargo was slightly damaged by salt water, but by reasonable care might be preserved; the master would not be justified in taking no care of it*".²²⁵

(*The Elli and The Frixos*) [2008] EWCA Civ 584. Also, see the cases prior to the Hague/Hague-Visby Rules, *Svendsen v Wallace Bros* (1885) 10 App. Cas. 404, at pp.417-418; 5 Asp MLC 453, p.457 (HL), per Lord Blackburn, approving *Rosetto v Gurney* (1851) 11 CB 176 and *Shipton v Thornton* (1838) 9 Ad & El 314; *Hill v Wilson* (1879) 4 CPD 329, p.333, 4 Asp MLC 198, p.200, per Lindley J; *Moss v Smith* (1850) 9 CB 94, p.106, per Cresswell J; *Philpott v Swann* (1861) 11 CBNS 270; *Benson v Chapman* (1849) 2 HL Cas 696, p.720, per Alderson B; *The Rona* (1884) 5 Asp MLC 259. Most of these cases were insurance cases. In contrast, the view has been expressed that the shipowner is not bound to execute any repairs at all, *Atwood v Sellar & Co.* (1879) 4 QBD 342, p.358, 4 Asp MLC 153, pp.157-158, per Cockburn CJ; cf *Worms v Storey* (1855) 11 Exch 427, pp.429-430, per Parker, but this is inconsistent with the cases cited above. See also *Wilson v Bank of Victoria* (1867) LR 2 QB 203, pp.211-212, per Blackburn J.

²²¹ *Madras Electric Supply Co. v P&O Steam Navigational Co.* (1924) 18 Ll. L. Rep. 94, p.97.

²²² *Madras Electric Supply Co. v P&O Steam Navigational Co.* (1924) 18 Ll. L. Rep. 94, p.97.

²²³ *The Rona* (1884) 5 Asp MLC 259. It is the master's duty to remedy the default by every reasonable means in his power.

²²⁴ *The Cressington* [1891] P 152, 7 Asp MLC 27, DC.

²²⁵ *Worms v Storey* [1855] 11 EX. 427, p.429, per Pollock B.

2.16.2 Second Scenario: A Repairable Defect which Causes Unreasonable Delay

This scenario may be most relevant to the carriage of perishable cargoes, e.g. banana fruits. For instance, a leakage in a cargo hold manifests itself during the voyage at sea but the master and his crew, following an assessment, have determined that the repair of the defect cannot be repaired unless, for example, the vessel's engines were stopped, which would cause unreasonable delay and probably more damage to the perishable cargo should the vessel arrive late at the port of discharge. The master decides, following consultation with his managers, not to repair it at sea, as the defect would only cause slight damage to the cargo in that particular hold, whereas repairing the defect at sea would cause delay and thus cause damage to the entire cargo. Declining to repair the defect at sea would most probably not be held as a lack of due diligence to restore the vessel's seaworthiness (in other words, to keep the vessel seaworthy during the voyage). In this case, one might rightly argue that, on the basis that both obligations of due diligence and of care of cargo continue for the entire voyage, whether the failure to protect the cargo would be considered as a failure to exercise due diligence or a failure to care of cargo. The question of why a court might need to distinguish Articles 13 & 14 immediately follows.

Act of the Carrier on Voyage: Exercising Due Diligence or Care of Cargo

Under the Hague/Hague-Visby Rules, the obligation to exercise due diligence to make the vessel seaworthy is an overriding obligation and the carrier must comply with it if he wishes to invoke the management of the ship exclusion in Article IV, r.2(a). The carrier could not use the exception of fault in the

management of the ship if the fault occurred during the seaworthiness obligation period, namely, 'before and at the beginning of the voyage'. During this period, the act of management is regarded as an act of seaworthiness or unseaworthiness. If any action occurred that caused loss or damage, the carrier will be in breach of his obligation to exercise due diligence. Under the Rotterdam Rules, the duty to exercise due diligence to provide a seaworthy vessel before and at the beginning of the voyage is extended to cover the entire voyage. Any act relating to the management of the vessel that results in loss, damage or delay will be regarded as a breach of seaworthiness. Tetley has concluded that "*in practice, deciding whether the carrier has properly and carefully kept, carried and cared for the goods within the meaning of art. 3(2) of the Rules cannot really be done in isolation, without also having regard to the carrier's due diligence obligation in respect of seaworthiness under art. 3(1)*".²²⁶ This interrelationship between the ongoing duties makes it necessary to distinguish between the action of the carrier as an exercise of due diligence or as an exercise of care over the cargo.

The approach taken when deciding whether an action or omission is a failure to exercise due diligence or a failure to care for the cargo may differ in different jurisdictions. It should be noted that the 'management of the ship' defence is abolished under the Rotterdam Rules. However, one approach might be for the court to distinguish between error of management of the ship and failure to care for the cargo for the purpose of correctly classifying whether Article 14, as an obligation to exercise due diligence, or Article 13, as an obligation to take care

²²⁶ Tetley, W., 'Properly Carry, Keep and Care for Cargo - art. 3(2) of the Hague/Visby Rules', cited in http://www.mcgill.ca/maritimelaw/maritime-admiralty/art3-2#N_88.

of the cargo, applies. This is a difficult task to pursue and it is suggested that courts must ascertain, on a complicated question of fact, what constitutes negligence as regards the management of the ship or negligence as regards the cargo. For instance, in *The Touraine*, a drainpipe in the seaman's washhouse became blocked during the voyage. A seafarer, in attempting to unblock the drainpipe, negligently pushed an iron rod down it which, unknown to him or anyone else, caused a pipe that passed through a cargo space to fracture with the result that every time a seafarer took a bath, a quantity of waste water fell onto the cargo. Nonetheless, because the seaman's negligence was directed purely towards the management and effective operation of the washhouse and not in any way directed at the care of the cargo, the court held that the owner could rely on the defence. If the Rotterdam Rules are applied to the facts, the carrier would be liable for failing to exercise due diligence as opposed to, in this case, the act of the seafarer which constituted a failure in the management of the ship, rather than in the care of the cargo. Under the current law, negligence relating to the management of the ship is excepted under Article IV, r.2(a) of the Hague/Hague-Visby Rules. In contrast, under the new continued obligation of due diligence in Article 14 of the Rotterdam Rules, similar negligence relevant to the management of the ship would now, under the Rotterdam Rules, equate to a failure to exercise due diligence and only negligence that relates to the cargo would equate to a failure to take care of the cargo under Article 13. In *Gosse Millerd v Canadian Government Merchant Marine*,²²⁷ the vessel became damaged on her voyage. Repairs were needed to enter the cargo hold where tin plates were stowed. This required the hatches to

²²⁷ *Gosse Millerd v Canadian Government Merchant Marine Ltd* [1929] A.C. 223.

be open and unprotected during a rainy day. The carrier could not rely on the management of the ship exception, as the cause of damage was the misuse of tarpaulins, which were used solely to protect the cargo. This case, if heard under the Rotterdam Rules, would result in a failure to care for the cargo, which is a failure to fulfil the obligation in Article 13. This case can be contrasted with *International Packers London Ltd v Ocean Steam Ship Co Ltd*,²²⁸ where the crew failed to use locking bars on the hatch covers during bad weather. As the bars were regarded as necessary for the protection of the ship, if Article 14 of the Rotterdam Rules had applied at the time, the crew's failure would be regarded as a failure to keep the vessel seaworthy as part of the continuous exercise of due diligence. The failure of the crew in endangering the safety of the vessel did not prevent the carrier from using the exception under Art. IV, r.2(a) of the Hague/Hague-Visby Rules. The critical factor was that proper use of the locking bars was mandatory under the Load Line Conventions, which aim to maintain the safety of vessels at sea.²²⁹ Where instruments, such as the Load Lines Convention or SOLAS, that relate to the safety of the vessel and constitute part of the exercise of due diligence before and at the beginning of the voyage, are not adhered to under the current regime, the vessel would be rendered unseaworthy.²³⁰ If the Rotterdam Rules form part of the applicable law, under the continued obligation of due diligence, the vessel is likely to be regarded unseaworthy if matters that affect the safety of the vessel at sea fail to be observed. Such a failure would obviously be regarded as a failure to exercise due diligence. Greer LJ has provided a good test to identify the act

²²⁸ *International Packers London v Ocean Steam Ship Co Ltd* [1955] 2 Lloyd's Rep. 218 (QB).

²²⁹ See Baughen, S., *Shipping Law* (4th ed.), 2009), at p.125.

²³⁰ See *The Eurasian Dream* [2002] EWHC 118; [2002] 1 Lloyd's Rep. 719 (QB). The effect of the safety rules and regulations, e.g. SOLAS, on the seaworthiness of the vessel are discussed in Chapter Four, see under para.4.3.1, at p.282.

leading to a breach of the seaworthiness obligation, which can now be used to distinguish such a breach from a breach of care of the cargo:

*“In my judgment, the reasonable interpretation to put on the [Hague] Rules is that there is a paramount duty imposed to safely carry and take care of the cargo, and that the performance of this duty is only excused if the damage to the cargo is the indirect result of an act, or neglect, which can be described as either (1) negligence in caring for the safety of the ship; (2) failure to take care to prevent damage to the ship, or some part of the ship; or (3) failure in the management of some operation connected with the movement or stability of the ship, or otherwise for ship’s purposes.”*²³¹

The conclusion on this point is that acts, such as failing to observe safety rules and regulations, during the voyage which could make the ship unseaworthy or uncargoworthy can now fall within Article 14 of the Rotterdam Rules. The following will demonstrate why, on some occasions, it is important to distinguish between a failure to adhere to either Article 13 or Article 14.

- Transhipment and Selling of Cargo: An Exercise of Due Diligence or Care of the Cargo?

Take for instance a defect that emerges during the voyage, which is likely to cause damage and which may constitute either a failure to exercise due diligence or a failure to care for the cargo. The test to ascertain whether the defect will constitute a failure in due diligence or a failure to care for the cargo is similar to that currently used under the Hague/Hague-Visby Rules, in deciding

²³¹ *Gosse Millerd v Canadian Government Merchant Marine* [1928] 1 K.B. 717 (CA), at p.744.

whether a failure is a failure in the management of the ship or a failure in caring for the cargo. However, if another action were required, such as transshipment or the selling of the cargo at an intermediate port, that action would be equal to a failure to care for the cargo under Article 13.²³² It is helpful to use a hypothetical situation to understand this point. Take, for example, a scenario where a defect emerges during the voyage. The defect may cause damage to the cargo and perhaps, if left unfixed, would endanger the safety of the vessel. In this example, the vessel is carrying two types of cargo; one perishable cargo and one non-perishable cargo.

The defect that emerged is one that can be repaired but it would cause unreasonable delay. The carrier, through his master, decides to carry out repairs but the delay causes the perishable cargo to become damaged. The decision to repair the defect will be considered as exercising due diligence to keep the vessel seaworthy because such a defect would have affected the safety of the vessel. However, the carrier might be under another obligation that is to tranship or sell the perishable cargo at the nearest port to prevent it from deteriorating.²³³ If the carrier does not sell or tranship the cargo, then this might constitute a failure to care for the cargo. In *Lekas & Drivas v Basil Goulandris*, a cargo of cheese was loaded on board the vessel, which was subsequently faced with an excepted peril (restraint of princes). The delay in the voyage

²³² *International Packers London Ltd v Ocean Steam Ship Co. Ltd* [1955] 2 Lloyd's Rep. 218, at p.238, per McNair J. The court held that the carrier was in breach of the duty to care for the cargo as the carrier decided to carry the cargo to its final port rather than to discharge it at the intermediate port knowing that the cargo had been wetted and that, by discharging the cargo at the intermediate port (Fremantle), there would have been a substantial reduction in the ultimate loss. In this case, the court ruled that the carrier was excused from liability in respect of the initial damage (due to the failure to use the locking bar) but liability had been established in respect of the carrier's failure to take proper steps to care for the cargo at Fremantle.

²³³ See *International Packers London Ltd v Ocean Steam Ship Co. Ltd* [1955] 2 Lloyd's Rep. 218 (QB).

caused the cheese to deteriorate. The Claimant attempted to prove that the damage to the cargo arose due to improper care of the cargo, arguing that the cheese should have been sold or refrigerated at an intermediate port where the vessel was delayed.²³⁴ It is possible that in this situation, the carrier may be obliged to land and sell cargo to prevent it from deteriorating.²³⁵ The obligation to tranship the cargo is different to the obligation to exercise due diligence to make the vessel seaworthy. The necessity and the duration of repair would damage the perishable cargo if it has not been transhipped. If the repair is short and unlikely to damage the cargo, the carrier might choose between either transhipping the cargo or stowing it in a refrigerated warehouse or container port side until the repair is completed.²³⁶ However, if the cargo is damaged during the discharge and re-stowing of the cargo, as necessitated by the repairs, this would be equal to a failure to care for the cargo under Article 13 and not a failure to exercise due diligence in repairing the vessel. In *The Oakhill*,²³⁷ the ship was under a voyage charter and stranded very shortly after sailing due to an error in navigation. For the repair to take place, cargo had to be discharged at the port of repair. The discharge was carried out negligently as different grades of pig iron were mixed and damaged. The carrier was held liable. The

²³⁴ It was held that “*circumstances may arise when the master of a ship has not merely the authority but, under sect. 3(2) of COGSA, the duty to sell cargo that is at risk of further deterioration, communicating with the owner if that is feasible, but still having both the authority and duty if it is not*”, 306 F.2d 426, at p.431; 1962 AMC 2366, at p.2373 (2 Cir. 1962); *U.S. v Lykes Bros. S.S. Co. Inc.* 511 F.2d 218, 1975 AMC 2244, at p.2253 note 15 (5 Cir. 1975). See also *Office of Supply v Naftoporos* 1987 AMC 697 (S.D. N.Y. 1985) where, before selling, the carrier had to first attempt to salvage the cargo and, when that failed, was obliged to obtain the cargo owner’s consent to sell the cargo. See also *Cargill Inc. v S.S. Nasagbu* 404 F. Supp. 342, at p.347; 1976 AMC 515, at p.520 (M.D. La. 1975), where the solicitation of sealed bids in order to dispose of a creosote-contaminated molasses cargo was found to be “reasonable and proper”. Authorities cited in Tetley, W., ‘Properly Carry, Keep and Care for Cargo - art. 3(2) of the Hague/Visby Rules’, cited in http://www.mcgill.ca/maritimelaw/maritime-admiralty/art3-2#N_88.

²³⁵ Tetley, W., ‘Properly Carry, Keep and Care for Cargo - art. 3(2) of the Hague/Visby Rules’.

²³⁶ A question of economics and the need to restore the vessel’s seaworthiness. See p.154.

²³⁷ *Eisenerz v Federal Commerce (The Oakhill)* [1975] 1 Lloyd’s Rep. 105 (Can. Supr. Ct).

court concluded that the loss caused during discharge at the intermediate port was directly due to a lack of care of the cargo and not to an error in navigation.²³⁸ Applying the Rotterdam Rules to this case, the deletion of the error of navigation exclusion would render the carrier liable for damage, loss or delay caused by the failure to exercise due diligence during the voyage (Article 14). However, the damage and the mixing of cargo at the port of repair would be a failure to care for the cargo under Article 13.

- The Importance to Make the Distinction

It is fundamental for the courts to distinguish the reason for the loss, i.e. whether it was caused by a failure to exercise due diligence or a failure to care for the cargo, for two reasons. First, the Rotterdam Rules allow a third party (a maritime performing party)²³⁹ to carry out or undertake to carry out any of the carrier's responsibilities during the port-to-port leg of the transport operation. If the preconditions of Article 19.1 are met, the carrier and the maritime performing party will be, according to Article 20.1, jointly and severally liable up to the limit provided for in the Rotterdam Rules.²⁴⁰ Therefore, the level to which the sub-contracted carrier is at fault will assist the court in determining the extent to which they must contribute to the loss.

²³⁸ Canadian Water Carriage of Goods Act, 1936.

²³⁹ A maritime performing party is a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage during the port-to-port leg, such as a sea carrier, feeder carrier, inland carrier etc. provided that he performs or undertakes to perform his services exclusively within a port area, or is a stevedore working in the port or a marine terminal operator.

²⁴⁰ Nikaki, T., 'The obligations of carriers to provide seaworthy ships and exercise care', cited as Chapter 4 in Thomas, R. (ed.), *A new convention for the carriage of goods by sea - The Rotterdam Rules*, (Lawtext Publishing Limited, 2009), at pp.101-102.

Second, Article 80.4²⁴¹ illustrates that parties to volume²⁴² contracts of carriage are allowed to agree upon greater or lesser obligations and liabilities than those required by Article 14(c) if the proviso in Article 80.2²⁴³ is fulfilled. This means that it is possible for the carrier to derogate from his duty to exercise due diligence to provide a cargoworthy vessel and container but not from other aspects of seaworthiness.²⁴⁴ This may make it important for the court to distinguish between a breach of the exercise of due diligence and a breach of the obligation to care for the cargo. Accordingly, if the court decides not to determine which of the obligations is breached, liability might fall on the carrier even if the contract of carriage included an express agreement for the carrier to derogate from the obligation of exercising due diligence to provide a cargoworthy vessel. The ruling of the court, as a result, would be odd and contradict the provisions of the contract. Further, it would impose an obligation contrary to what the parties agreed upon.

Third, deciding on which obligation has been breached would determine the standard of proof of causation on the claimant. The text ‘probably caused’ in Article 17(5) intended to give a somewhat lower standard than the normal

²⁴¹ Article 80.4 reads that: “*Paragraph 1 of this article does not apply to rights and obligations provided in article 14, subparagraph (a) and (b), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in article 61*”.

²⁴² Article 1(2) of the Rotterdam Rules provides that “Volume contract” means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.

²⁴³ This means that derogation from cargoworthiness duty will only be allowed if:

- (a) The volume contract contains a prominent statement that it derogates from the Convention (the Rotterdam Rules);
- (b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogation;
- (c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this convention without any derogation under this article; and
- (d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.

²⁴⁴ This binds the carrier and the shipper but not subsequent holders of a negotiable transport document or electronic transport record pursuant to Article 80.5.

causation standard in proving seaworthiness.²⁴⁵ This might mean that the claimant bears a lesser burden when proving the causal link between loss and unseaworthiness, as compared to proving the causal link between loss and breach of the duty to care for the cargo. Thus, it might be easier for the claimant to prove a breach of the seaworthiness obligation instead of a failure to care for cargo.

The carrier should choose between sacrificing the cargo by not rectifying the unseaworthiness and the damage to or loss of the cargo that will be incurred in the event that measures are taken to rectify the unseaworthiness. In the event of loss and a subsequent claim, a court will carry out the same balancing process, albeit *ex post facto*, and will take into account the seriousness of the consequences of the unseaworthiness. According to Broderick DJ “*Due diligence’ requires a careful balance between inspection and repair proportionate to the danger (and the seriousness of the consequences of the unseaworthiness)*”.²⁴⁶ Consequently, the balance that a carrier is required to strike is a fine one “*because liability to delay would also be for its account if the fulfilment of the due diligence obligation causes delay*”.²⁴⁷ It appears that, in a dilemma between the need for the carrier to answer rationally a question of pure economics (i.e. saving more cargo) and the need to restore, at least in theory, the vessel’s seaworthiness at sea and cause more damage, the former should prevail. Besides, apart from risk sharing and attribution of liability, commercial, monetary and practical efficiency as well as preservation of wealth are underlying reasons behind the very notion of seaworthiness. This is certainly

²⁴⁵ A/CN.9/572 - Report of Working Group III (Transport Law) on the work of its fourteenth session Report, para. 24, 26 and 31.

²⁴⁶ *The Hellenic Glory* [1979] 1 Lloyd’s Rep. 424, at p.430, per Broderick DJ.

²⁴⁷ Baatz, Y. et al., *The Rotterdam Rules: a practical annotation* (Informa, 2009), p.40.

something to be taken into account in the subsequent general average adjustment. The situation might be different if the cargo carried on board a vessel belonged to a single cargo owner and a defect emerged during the voyage. If the carrier chooses to repair the vessel, which causes delay and in turn causes damage to perishable cargo owned by a single owner, the carrier would be liable for the damage of the entire cargo. The best option in this case would be for the carrier to sacrifice some of the cargo by not repairing the defect and to carry on with the voyage, perhaps with maximum possible speed to reach the discharge port as quickly as possible in order to reduce the amount of damage to cargo as a result of a defect in the cargo hold. The carrier pursuant to Article 16²⁴⁸ will be excused from the obligation to repair the defect and “sacrifice [a small amount of the] goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving ... property [namely, the majority of the goods]”.²⁴⁹

The fact that a carrier discovers in the course of the voyage that the vessel is unseaworthy does not necessarily mean that the voyage has to be terminated or that the vessel should be diverted to the nearest port in order to remedy the unseaworthiness. If the situation shows that the “cure is sometimes worse than the disease”, it will not be wise to effect such a repair. Hobhouse J²⁵⁰ in *The Yamatogawa* stated that “[d]ismantling any piece of gearing, particularly one as large as this and in an engine room as cramped as this one was, involves an element of risk which should not be undertaken unless there is some adequate

²⁴⁸ Article 16 entitled ‘Sacrifice of the goods during the voyage by sea’.

²⁴⁹ Article 16 reads that: “Notwithstanding articles 11, 13 and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.”

²⁵⁰ *The Yamatogawa* [1990] 2 Lloyd’s Rep. 39, p.50.

reason for doing so.” Similarly, if the defect causing the unseaworthiness was not serious, it would not be unreasonable for the shipowner to defer the repair until the next port of call. On the contrary, in the interest of commercial convenience and for the purpose of avoiding delays, this might be the chosen course of action. It follows that if the claimant cargo-interests are able to suggest something that the carrier should have done, the court should take into account how burdensome the carrying out of the suggested work would have been in terms of both the length of time required²⁵¹ and the associated cost. For example, in *The Australia Star*, Bucknill J²⁵² ruled that peeling off the insulation from the refrigerated walls prior to each voyage to check for and repair leaks was impracticable on the grounds of expense. So, if the deviation and repair would involve a higher cost, the carrier might not be liable for failing to exercise due diligence in deciding not to call at an intermediate port or a port of refuge. However, with regard to the costs associated with the restoration of the vessel’s seaworthiness, the approach of the courts in the application of a similar obligation under a term of a charterparty, that is the maintenance clause, seems to be different. In the recent case of *The Elli and The Frixos*,²⁵³ the court held that the maintenance clause of the relevant charterparty imposed on the

²⁵¹ *Phelps, James & Co. v Hill* [1891] Q.B. 605 (C.A.). The cargo from *Llandaff* was damaged due to a storm during the course of the voyage and it was necessary to put the vessel back to the port of refuge. The defendant owners ordered the vessel to deviate to the owners’ yard for cheaper repairs. On the way she ran into another vessel and sunk. The court found that there had not been an unjustifiable deviation or time taken. Lopes LJ stated that “*the voyage [to the repair port] must be prosecuted without unnecessary delay ... provided that such repairs, under the circumstances and at such port, were reasonably necessary and the delay not greater than necessary for the completion of such repairs*”, at pp.613-614.

²⁵² *The Australia Star* (1940) 67 Ll. L. Rep. 110, p.118.

²⁵³ *Golden Fleece Maritime Inc and Another v St Shipping and Transport Inc (The Elli and the Frixos)* [2008] 2 Lloyd’s Rep. 119. See also *Sania Societa di Navigazione Industria e Commercio v Suzuki & Co. and Teikoku Kisen Kaisha* [1923] 17 Ll. L. Rep. 78, p.88, per Greer J.

shipowner a continuing duty to exercise due diligence to make the vessel seaworthy without any financial limit.

On the other hand, Article 14 would render the carrier liable for delay,²⁵⁴ not only for not taking reasonable steps in the exercise of due diligence to repair the defect in a timely manner and restore the vessel's seaworthy condition but also for the time taken to discover the defect, when no reasonable or adequate effort was made to discover such a defect and as a result, damage or delay occurred.²⁵⁵ However, it should be noted that a vessel is not to be rendered unseaworthy for a defect that has no material effect on the vessel's safety, her operational efficiency, or the safety, integrity or condition of her cargo or for a defect which is of no real commercial significance. For example, a defect which does not render the vessel unfit, even though the equipment in question does not comply with the requirements of the vessel's charterparty²⁵⁶ or some other statutory or class requirement, but is harmful to the environment.

2.16.3 Third Scenario: A Defect Temporarily Repairable

This scenario, unlike the first one, relates to a defect that can be rectified by a temporary repair but will require further attention at a later stage. The example of leakage in one of the cargo holds that was detected during the voyage will be used again. In this case, if the defect could only be temporarily remedied due to a lack of time, manpower, spares or tools or in order to avoid unreasonable delay then, insofar as delivery of the cargo at the discharge port is concerned, it

²⁵⁴ See Diamond, A., 'The Rotterdam Rules' (2009) LMCLQ 455, p.470.

²⁵⁵ *Cranfield Bros. Ltd v Tatem S.N. Co. Ltd* (1939) 64 Ll. L. Rep. 264, p.267, per Hilbery J. The time that has elapsed from one inspection to another is an essential element in deciding whether the carrier has exercised due diligence or not.

²⁵⁶ See Coghlin, T. et al., *Time Charters*, (LLP, 6th ed., 2000), para.38.8.

would suffice for the carrier to discharge his due diligence obligation by carrying out such temporary repairs. However, further attention would be required to carry out a permanent repair at the next port of call because, if during the carriage of any subsequent shipment under a new bill of lading the temporary repairs gave way and consequential damage was caused to the cargo, the carrier would be held liable on account of his failure to exercise due diligence to make the vessel seaworthy before or at the commencement of the voyage.²⁵⁷

2.16.4 Fourth Scenario: A Defect Unrepairable at Sea

This scenario envisages a failure that cannot be rectified at sea. For example, a defect with the autopilot system that cannot be fixed during an ocean passage with the resources on-board the vessel. The defect may not be repairable at sea for a number of 'innocent' reasons, including the work might demand a highly skilled specialist technician or spare parts that might be required are unavailable²⁵⁸ or are not those required by the vessel's class or administration to be on-board.²⁵⁹

In such circumstances, the way for the carrier to discharge the continuing due diligence obligation is (a) to refrain from using the autopilot, if, of course, this is

²⁵⁷ The court in *The Merchant Patriot* (2000) transcript of the US District Court of Georgia, 17 February, pointed out the critical acts of the owners, *inter alia*. There was a failure to make a permanent repair to the patched aft pipe after more than three years and intervening dry-docking. This demonstrated, the court said, either an ineffective follow-up system, or a conscious decision to leave the pipe in place, which established a case of failure to exercise due diligence to make the vessel seaworthy.

²⁵⁸ The spare parts required should not be listed as spare parts available on-board. Otherwise, their absence would constitute unseaworthiness due to inadequate supplies or a shortage of supplies. For example, see *Guinomar of Conakry v Samsung Fire & Marine Insurance Co. Ltd (The Kamsar Voyager)* [2002] 2 Lloyd's Rep. 57, per Dean J. The vessel was found unseaworthy for inadequate spare parts; namely, the wrong supply of the main engine's piston.

²⁵⁹ In terms of a sufficient and competent crew, navigational equipment and supplies, stores, provisions and spares, bunker fuel, fresh water etc., the vessel must be properly equipped and supplied for the expected duration of the voyage, *Project Asia Line Inc v Shone (The Pride of Donegal)* [2002] EWHC 24; [2002] 1 Lloyd's Rep. 659, p.674, per Smith J.

not considered to be risky; and/or (b) to proceed to the nearest port and carry out the repair there.²⁶⁰ With the latter requirement, however, the proper course of action may depend on the circumstances of the case and, in particular, the reason that prevents the vessel and her crew to carry out the repair at sea.²⁶¹ If, for instance, the vessel's electrician could have repaired the defect but was unable to do so due to a lack of spare parts, the master, through the company's DPA,²⁶² the vessel's superintendent or the carrier's agents, should have requested the required spare parts to be received at the next port of call so that the electrician would be able to carry out the repair without delay. It could be said that the proper course of action depends largely on the imminence of the situation.²⁶³ The safety of the vessel and cargo, or even the possibility that the defect may cause damage to the cargo, might dictate the master's decision to call at the nearest port for repairs.

Finally, there may be circumstances where the carrier might not be able to fully discharge his continuing due diligence obligation even if he or his employees did take action but did not fully exercise due diligence in that particular case. For instance, if after a collision, the crew did not take any action to isolate cargo holds that were damaged by seawater and prevent damage spreading to the rest of the cargo holds, while the decision to deviate to the nearest port of repair was being made. Similarly, it might be the case that failing to sail to the nearest

²⁶⁰ Returning to the port of loading or proceeding to a port of refuge for the purpose of executing the necessary repairs. See *Phelps, James & Co. v Hill* [1891] 1 Q.B. 605; 7 Asp MLC 42. As to proceeding to a port of refuge, see *Kish v Taylor* [1912] AC 604; 12 Asp MLC 217 (HL).

²⁶¹ A/CN.9/510 - *Report of the Working Group on Transport Law on the work of its ninth session* April 2002, p.15 cited in <http://daccessdds.un.org/doc/UNDOC/LTD/V02/541/91/PDF/V0254191.pdf?OpenElement>, on 17 July 2006. Working Group III stated: "However, it was suggested that the degree of diligence would or should depend on the context, to the effect that, for example, the duty of the carrier would be different depending on whether the vessel was at sea or in port."

²⁶² The role of the Designated Person Ashore (DPA) under the ISM Code is liaising between the vessel and the shore management of the carrier.

²⁶³ See Baatz, Y., *The Rotterdam Rules: a practical annotation* (Informa, 2009), para.14-03.

port of repair and choosing to go to one further away that charges less for the same repair, results in more cargo being damaged than if the vessel had called at the nearest port of repair. The carrier in such cases would be liable for the damage caused by not discharging his duty of seaworthiness, as required of a diligent carrier.

It is important that the master and crew should carry out, in addition to any repair work, a risk assessment, as part of the ongoing obligation, to prevent cargo damage once a defect has been detected and damage has already been caused to the cargo.²⁶⁴ These considerations should include, for example, stopping a flow of water, preventing fire or water from spreading to other cargo holds, and so on. It should not be forgotten, however, that issues of cargo transshipment and onward carriage, or even issues of frustration of the contractual voyage, might come into play if the damage is so extensive that it cannot be fixed, e.g. crankshaft damage rendering the vessel a constructive total loss.²⁶⁵ The question that would naturally arise in such circumstances is whether the carrier, in order to fulfil his other contractual obligations under Article 11,²⁶⁶ would be bound to tranship the cargo onto another vessel for onward carriage to, and delivery at, the contemplated destination.²⁶⁷

Instead, it was pointed out that the obligation is to exercise due diligence to make the vessel seaworthy rather than an absolute obligation to provide a seaworthy vessel,²⁶⁸ the standard of due diligence exercised would be judged

²⁶⁴ See f.n. 177, at p.130. See also subpara. '(b) the impact of risk assessment on the manning of the vessel', at p.304.

²⁶⁵ *The City of Alberní* [1947] 2 D.L.R. 647 (defected shaft was not repairable on-board).

²⁶⁶ Article 11 reads: "*The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.*"

²⁶⁷ See Diamond, A., 'The Rotterdam Rules', (2009) LMCLQ 455, p.470.

²⁶⁸ See para.2.2, at p. 82.

by reference to that which a reasonable and prudent shipowner would exercise. This essentially means that damage, loss or delay resulting from unseaworthiness that arose after the commencement of the voyage does not automatically signify that a shipowner would be liable. However, the shipowner still needs to discharge the due diligence obligation for the period after the commencement of the vessel's voyage. This will be done by showing that reasonable measures have been taken during the voyage and, more importantly,²⁶⁹ before and at the beginning of the voyage. In ascertaining whether the shipowner has acted reasonably, the court would not merely take into account that repairing a ship at sea may be difficult but also that the discovery and cure of a defect might be traced back to the period 'before and at the beginning of the voyage'. It is submitted, therefore, that the essential difference between the duty to exercise due diligence before and at the beginning of the voyage and the continuing duty to exercise due diligence during the voyage is that the courts have to take into account that both discovering and repairing unseaworthiness is more difficult at sea and that this might be overcome by increasing the required due diligence activity imposed on the carrier for the period before the commencement of the vessel's voyage. The Admiralty Judge, Dr Lushington, in 1863 propounded that "[r]easonable diligence [means] *not the doing of what is possible only, but the doing of that which, under ordinary circumstances and having regard to the expense and difficulty can be reasonably required*".²⁷⁰

2.17 Conclusion

²⁶⁹ It has been explained that most of the efforts related to exercising due diligence are made before the beginning of the voyage. See under para. 2.14.1, at p.128.

²⁷⁰ Cadwallader, F. J., 'Seaworthiness - An Exercise of Due Diligence', a paper on Bill of Lading Conventions Conference, New York, (Lloyd's of London Press, November 29/30, 1978), at p.2.

Insofar as the 'due diligence' obligation is concerned, the language of Article 14 of the Rotterdam Rules is similar to Article III, r.1 of the Hague/Hague-Visby Rules. However, there are words such as 'keep' and 'container' in Article 14 that might raise the question as to the potential effect of these words on the obligation of seaworthiness.

However, the main difference in language that is expected to substantially increase the risk of liability of the carrier is the addition of the word 'during', thereby extending the obligation to exercise due diligence to the entire voyage. Arguably, the Rotterdam Rules remove the uncertainty as to the moment at which the obligation ends at the loading port, namely '*before and at the beginning*'²⁷¹ of the voyage. However, the grey area has now shifted to the 'end' of the voyage and the question of when is the exact moment at which the duty comes to an end arises. Is it when the sea passage comes to an end (i.e. at the ship's arrival at the destination port) or at some time later (e.g. on the ship's berthing)? The Rotterdam Rules do not define this. It may be anticipated, therefore, that the Courts (and indeed scholars) will need to deal with this question. It is doubtful whether the 'end' of the obligation coincides in time with the completion of the discharge of the cargo, although this has been argued by one scholar.²⁷² Whilst cargo discharge is one aspect of cargo management, it cannot, by any overstressing of the language or purposive interpretation, be said to fall within the 'voyage by sea'. Arguably, the interpretational approach by the mere addition of the words 'and during' to the voyage, would be that the obligation terminates when the sea voyage terminates. This is to include the

²⁷¹ Article 14 of the Rotterdam Rules.

²⁷² Nikaki, T., 'The obligations of carriers to provide seaworthy ships and exercise care' cited as Chapter 4 in Thomas, R. (ed.), *A new convention for the carriage of goods by sea - The Rotterdam Rules*, (Lawtext Publishing Limited, 2009), at p.107.

duty for container seaworthiness where 'discharge', in door-to-door transportation, can technically take place far away from the port. Further, by analogy to some decided cases on the Hague/ Hague-Visby Rules on the issue of voyage 'commencement', the voyage may be said to come to an end once the vessel has entered the 'commercial limits' of the discharging port.²⁷³ The parties, in any event, can remove any uncertainty by making specific provision for this in the contract of carriage.

The addition of the word 'during' certainly cannot be taken to mean that the carrier will be entitled to discharge his pre-voyage due diligence obligation after the commencement of the voyage. '*During*' cannot be an alternative to '*before and at the commencement*' but only an addition. The on-going duty, as extended beyond the commencement of the voyage, might require extra activities for the fulfilment of the due diligence obligation, which the carrier has to bear in mind when planning the voyage *before* its commencement. The court, in deciding whether the carrier has exercised the required pre-voyage due diligence, should arguably consider the post-commencement on-going obligation. Again, the prudent carrier's behaviour in accordance with shipping practice at the time is the yardstick against which all of the above will be judged. Although the pre- and post- commencement due diligence obligations appear to be the same, there may be significant differences in practice as regards its exercise by the carrier. This may be dictated by factors such as (i) the nature of the defect; (ii) the possibility of causing damage to the cargo; and, (iii) access to the necessary facility to remedy the defect and reinstate the vessel's seaworthiness. What was good enough before and at the beginning of the

²⁷³ See under para. 2.13, at p.127

voyage may well be inadequate if experience has shown that during the voyage or at an intermediate port, the vessel needs further examination. A defect that is not discoverable in the port but is discoverable at sea triggers the due diligence obligation of the carrier afresh once this is discovered or ought to have been discovered. This is why under the new regime the on-going due diligence obligation becomes important. The carrier, most likely, will be held to not have exercised due diligence in relation to a defect which manifested during the voyage and either (i) it was not repaired even though it was repairable with the use of the limited resources on board, or (ii) the carrier did not obtain the spare parts or summon the services of expert technicians by calling at the nearest supply station or port provided that the ensuing delay would be reasonable in the circumstances. The position, however, would be the same as that under the Hague/Hague-Visby Rules when a defect manifests itself after the beginning of the voyage but is not repairable during the voyage. To conclude, the test for the on-going due diligence obligation under the Rotterdam Rules should be '*Would a prudent shipowner, if he had known of the defect, have continued the voyage without effecting any possible repairs?*'

In practice, whether or not the carrier has exercised due diligence to 'keep' the vessel seaworthy during the voyage will be left entirely for the courts to decide on a case-by-case basis. There may be numerous situations but four potential (hypothetical) scenarios were examined above in respect of the exercise of due diligence for defects that manifested themselves after the commencement of the voyage and which, by definition, were not discoverable by the exercise of due diligence before and at the commencement of the voyage. These hypothetical scenarios concern (i) a defect repairable at sea; (ii) a repairable

defect which causes unreasonable delay; (iii) a defect repairable only temporarily; and, (iv) a defect repairable only if the vessel is at port.

As regards the first, it goes without saying that when a defect can be repaired (temporarily or permanently) at sea by the crew and the crew fail to take such remedial action, the carrier should be held not to have exercised due diligence in relation to the particular defect. This will be the outcome in such circumstances either by drawing an analogy to cases under the current law concerning unseaworthiness caused by crew actions or omissions (negligence) and/or by upholding that that was the intention of the drafters of the Rotterdam Rules when they decided to abolish the 'crew negligence' defence. The carrier, through the master and his crew, must as a minimum take all reasonable steps to prevent further damage or loss and mitigate the consequences of a defect causing unseaworthiness.

Turning to the second hypothetical scenario, in circumstances where the restoration of a vessel's seaworthy condition would cause unreasonable delay or further damage, the carrier (and the court *ex post facto*) will need to carry out a balancing exercise when sacrificing part of the cargo for the preservation of the rest. In circumstances where the cure would be worse than the disease, it will be wise to not effect the repair. Alternatively, where the only choice is between (a) the costs involved in saving more cargo and (b) restoring the vessel's seaworthiness at the expense of causing further damage to the cargo, the carrier should choose the former, as long as safety is not in issue.

With regard to the third hypothetical scenario, the temporarily repairable defect is one that needs further attention at a later stage. Whilst it would suffice for the carrier to discharge his due diligence obligation by carrying out the required

temporary repairs, lack of further attention and failure to permanently repair the defect, for instance at the next port, could be taken as an overall failure to exercise due diligence if subsequent damage is caused to the cargo by the unseaworthiness.

The last (fourth) hypothetical scenario, concerns defects that may not be repairable at sea or at an intermediate port for a number of 'innocent' reasons, e.g. a repair that demands a highly skilled specialist technician or unavailable spare-parts. In such circumstances, the proper course of action would largely depend on the imminence of the situation. The safety of the vessel and cargo, or even the possibility that the defect may cause damage to the cargo, might dictate the master's and the carrier's decision to call at the nearest port for repairs. This would involve a risk assessment to consider the vessel's safety and any cargo damage prevention or mitigation, along with, of course, the safety of the crew and pollution prevention. Cargo transhipment and onward carriage, or even issues of frustration of the contractual voyage, might come into play if the damage is so extensive that it cannot be fixed at all or within a reasonable time. The question that would naturally arise in such circumstances is whether the carrier, in order to fulfil his other contractual obligations under Article 11, would be bound to tranship the cargo onto another vessel for onward carriage to, and delivery at, the contemplated destination.

It was further discussed in this chapter whether the act of the carrier which caused damage to the cargo should be classified as a failure to exercise due diligence pursuant to Article 14, or as a failure to fulfil his obligation under Article 13 of the Rotterdam Rules, e.g. negligence as regards the cargo. It was suggested that failure to observe safety matters which endanger the safety of

the vessel should now be regarded as falling within Article 14 of the Rotterdam Rules. Whereas acts which affect the status of the carrying cargo should be regarded as a failure to observe Article 13. It was further discussed that it is important to make such a distinction between Articles 13 and 14 in order to determine the exact obligation imposed on the carrier and thus the potential liability of the carrier. For example, if the contract of carriage is a volume contract, the distinction between Articles 13 and 14 would determine the limit of each party's obligation and thus the correct liability.

2.18 Overall Conclusion

The nature of the due diligence obligation is relative to and dependent upon the dynamics and circumstances²⁷⁴ surrounding each case. First, there is no single definition that could embrace all aspects of the required standard of due diligence. Secondly, the standard of due diligence might depend upon the circumstances of each case. However, the various standards of the shipping industry, as well as outcomes from case law, provide guidance and are a good indication as to whether or not the carrier has in particular circumstances exercised the required due diligence. It might be correct to say that the exercise of due diligence to provide a seaworthy vessel would be extended well before the beginning of the voyage²⁷⁵ but there is an uncertainty under the Hague/Hague-Visby Rules as to when exactly the duty ends and also its

²⁷⁴ I.e. knowledge, technology and standard of shipping industry. See, *Demand Shipping Co. Ltd v Ministry of Food Government of the People's Republic of Bangladesh and Another (The Lendoudis Evangelos II)* [2001] 2 Lloyd's Rep. 304. *F. C. Bradley & Sons Ltd v Federal Steam Navigation Co. Ltd* (1926) 24 Ll. L. Rep. 446. *President of India v West Coast S.S. Co* [1963] 2 Lloyd's Rep. 278, p.281.

²⁷⁵ In theory, and depending on the nature of the defect, it could be extended as far back in time as the vessel's last dry-dock, which could be up to 5 years.

preconditions. The matter should be determined by looking into the legal and operational requirements relevant to the 'commencement' of the voyage in each case.

A familiar phraseology appears also in Article 14 of the Rotterdam Rules which provides for the carrier's duty to exercise due diligence in respect of seaworthiness. Unlike the Hague/Hague-Visby Rules, the duty imposed upon the carrier is for the period before, at the beginning and *during* the voyage. The extension of the duty extinguishes the problems existing under the Hague/Hague-Visby Rules in relation to exact time of the end of the duty. One might argue that the same problem might be relevant under the Rotterdam Rules with the question having shifted from the 'commencement' of the voyage to the 'end' of the voyage. What would be the position in the case of cargo damage caused by unseaworthiness when the vessel was sailing upriver under the pilot's instructions towards her discharging berth and after her sea passage had ended? Did, for such purposes, the voyage actually end at the 'end of sea passage' or did the damage occur during the 'during' period?

It should be remembered that the duty is to exercise due diligence and it is not an absolute duty. It should also be remembered that the transition to an extended duty does not mean that the duty to exercise due diligence is necessarily the same throughout the period of the carrier's responsibility. It is of the same legal importance but it differs in a significant practical sense.²⁷⁶ The circumstances of each case are different and must be taken into consideration when determining whether or not the carrier has discharged his obligation in the exercise of due diligence. The same applies to the on-going duty of due

²⁷⁶ See Sturley, M. et al., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters, 2010), p.85.

diligence. One could claim that incidents which could not have been foreseen by the exercise of due diligence, i.e. by proper procedures, inspections and tests, and consequently could not have been avoided by a prudent carrier, would not render the carrier liable for unseaworthiness in respect of the initial obligation of due diligence.²⁷⁷ The same is true for the on-going obligation but then the carrier must exercise due diligence to restore the vessel's seaworthiness at sea even if this would necessitate the ship's deviation. Nevertheless, it might not always be possible to repair a defect at sea or restore the vessel's seaworthiness.

The extended duration of the due diligence obligation will inevitably increase the required activities and the standard of due diligence from that applicable for the period only 'before and at the beginning' of the voyage. This might mean that the shipowner should now exercise due diligence not only in relation to the vessel's repair or restoration as regards seaworthiness but also in relation to the carrying out of checks, examinations and preventative risk assessments at all times including actions to be taken in mitigation of the consequences of a defect. It would not be enough for the carrier to say that he had done his best upon the emergence of a defect when he should have had in place a system with procedures providing for regular tests, checks and risk assessments which might have enabled him to discover the defect in question at an earlier time or to prevent its occurrence and the consequent cargo loss or damage.

²⁷⁷ See Karan, H., *The Carrier's Liability under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules*, (The Edwin Mellen Press, 2004), p.282.

CHAPTER THREE

BURDEN OF PROOF AND COMMERCIAL RISK ALLOCATION

“It is He Who has made the sea subject, that ye may eat thereof flesh that is fresh and tender, and that ye may extract therefrom ornaments to wear; and thou seest the ships therein that plough the waves, that ye may seek (thus) of the bounty of Allah and that ye may be grateful.” (Ibrahim, Chapter 14, Verse 32)

Introduction

In order to form a view as to whether the Rotterdam Rules provide a sound regulatory regime in respect of the seaworthiness obligation, it is as important to consider not only Article 14 that deals with the due diligence obligation but also a number of other factors. The current law can arguably be said to be carrier-oriented.¹ Accordingly, one must question whether the Rotterdam Rules are seen as serving the interests of the respective national industries better; in other words, are they cargo-oriented or carrier-oriented?² On balance, the cargo-interests arguably seem to be better served by the new regime rather than by the present one. Furthermore, one of the basic questions relating to the question of seaworthiness is that of the burden of proof. This Chapter deals with this area of law.

¹ Nicholas, A. ‘The duties of carriers under the conventions: care and seaworthiness’ cited as Chapter Six in Thomas, R. (ed.), *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd’s List, 2010), at p.117; American Bar Association, ‘Maritime Law Association of the United States Tort Trail and Insurance Practice Section’, (2010) report 101, cited in: http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/executive_summaries_index.authcheckdam.pdf

² This Chapter will look at one of the problems considered by Tetley who argues that on policy grounds, the burden of proof under both regimes should rest with the carrier being usually the party with access to the full facts; see Tetley, W., *Marine Cargo Claims* (4th ed., 2008), p.889.

The main issue of this Chapter is how the burden of proof is regulated in the Rotterdam Rules and how liability is allocated between the carrier and the cargo-interests in cases where there are one or more cooperating or independent causes of the loss, damage or delay. The answers to these questions are essential in determining whether, as a matter of policy, the seaworthiness obligation and the consequent liability are heavier under the Rotterdam Rules or, whether the current law is preferable.³ For this purpose, a comparison between the Hague/Hague-Visby Rules in Part I and the Rotterdam Rules in Part II is provided.

There have been cases where the liability might have been decided differently if the burden of proof had been allocated differently between the two litigants. Cases have been lost because the party on which the burden was lying failed to discharge that burden. Insofar as seaworthiness is concerned, the relevant questions regarding the ‘burden of proof’ are as follows: in an unseaworthiness dispute between the carrier (shipowner) and a cargo-interest or charterer, who needs to prove what?⁴ Is it the carrier or is it the cargo-interest who must prove that the vessel was seaworthy? What difficulties are faced by each party (carrier v cargo-claimant)? Answering these questions will demonstrate whether the current law regarding burden of proof in an unseaworthiness case is sound or constitutes an area that needs reform.

³ Specific consideration of this issue in the context of carriage of goods by multimodal transport within the regime of the Rotterdam Rules is covered in Chapter 5, entitled: The implications of the multimodal aspect of the Rotterdam Rules on the seaworthiness obligation and the consequential liabilities, and thus only a general discussion is made in this chapter.

⁴ See *Aktieselskabet de Danske Sukkerfabriker v Bajamar Compania Naviera SA (The Torenia)* [1983] 2 Lloyd’s Rep. 210, p.215, per Hobhouse J: “*The incidence of the legal burden of proof can therefore be tested by answering the question: What does each party need to allege?*”

Finally, in light of some of the problems demonstrated, certain solutions are proposed as these have been advanced by a number of scholars.

Part 1 – The Burden of Proof in Article IV r.1 of the Hague/Hague-Visby Rules⁵

3.1 Introduction

The starting point is Article IV, r.1⁶ of the Hague/Hague-Visby Rules which provides that the carrier shall not be liable for loss or damage due to the unseaworthiness of the vessel unless caused by want of due diligence. More importantly, under English law, Article IV, r.1 plays a role in the allocation of the burden of proof.⁷ Carver,⁸ Scrutton⁹ and Cooke¹⁰ refer to *Minister of Food v Reardon Smith Line*¹¹ and submit that the allocation and division of the burden of proof is regulated by Article IV, r.1, which imposes the burden of proof on the cargo-claimant. It must be said that many jurisdictions have considered the

⁵ The Hague/Hague-Visby Rules do not specifically deal with the onus of proof. Exactly how the burden is allocated is a matter that is left to the court to decide in each country; UNCITRAL Working Group on International Shipping Legislation Report of the 3rd session (A/CN.9/63) (United Nations Geneva, 1972), para. 167.

⁶ 'Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.'

⁷ In *Leesh River* case, it argued that Article IV r.1 should be regarded as an ordinary exception and it was the ground for appeal; *Leesh River Tea Co. v British India Steam Navigation Company Ltd* [1966] 1 Lloyd's Rep. 450, p.457; on appeal [1967] 2 Q.B. 250, p.270, as per Seller LJ and Salmon LJ.

⁸ Colinviaux R., *Carver's Carriage by Sea*, (Steven & Sons, 1982), p.377.

⁹ See Eder, B. et al., *Scrutton on Charterparties and Bills of Lading*, (Sweet & Maxwell, 3rd ed., 2011), para.20.072.

¹⁰ Cooke J., *Voyage Charters*, (22nd ed., 2007), para.85, 251.

¹¹ *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep. 265. McNair J stated that: "the second sentence in Article IV r.1 strongly supports the submission...that no onus as to seaworthiness is cast on the shipowner, except after proof has been given by the other party that the damage has resulted from unseaworthiness," p.272.

provisions in Article IV, r.1 as an additional exception rather than as allocating the burden of proof.¹² It is difficult to see that this Article has a purpose other than to ensure that the burden of exercising due diligence to make the vessel seaworthy rests on the carrier. Most of the Article seems a mere repetition in negative order of the positive seaworthiness duty stated in Article III, r.1.¹³ However, the present Article has no limitation as to the time at which the carrier should exercise due diligence, that is *'before and at the beginning of the voyage'*, as required under Article III, r.1. The reference to *'in accordance with the provisions of paragraph 1 of Article III'* would suffice to apply such a limit.¹⁴

The net effect of this Article when read with Article III, r.1 seems to be that the carrier is liable for loss or damage caused by unseaworthiness unless he can prove that he exercised due diligence before and at the beginning of the voyage to provide a seaworthy vessel. However, this suggests a general presumption that no onus is imposed on the carrier in relation to proof of due diligence until the claimant has initially established the unseaworthiness that caused the loss.¹⁵ This, therefore, raises the question as to whether this system of burden of proof is a sound one. In order to answer this question, it would be essential to analyse in detail the position under the Hague/Hague-Visby Rules.

¹² In many jurisdictions, such as France and The Netherlands, Article IV r.1 is considered as the exception beside the exceptions listed in Article IV r.2. It has been regarded as an exception for loss or damage caused by unseaworthiness for which the carrier is not responsible; that is, unseaworthiness which was not a result of his failure to comply with Article III r.1. See Margetson, N. H. Margetson, N. J. and Hendrikse, M. L., *Aspects of Maritime Law: Claims Under Bills of Lading*, (Wolters Kluwer, 2008) at p.117; on the French Law, see Clarke, M., *Aspects of the Hague Rules* (Martinus Nijhoff, 1976) at p.151.

¹³ Treitel G., and Reynolds F., *Carver on Bills of Lading*, (Sweet & Maxwell, 3rd ed., 2011), para. 9.206.

¹⁴ This was assumed in *Leesh River Tea Co. Ltd v British India S.N. Co. Ltd* [1967] 2 Q.B. 250, pp.270, 275 (C.A.).

¹⁵ See *The Toledo* [1995] 1 Lloyd's Rep. 40, p.50; *Eridania SPA and Others v Rudolf A Oetker and Others (The Fjord Wind)* [2000] 2 Lloyd's Rep. 191; *Guinomar of Conarky v Samsung Fire & Marine Insurance (The Kamsar Voyager)* [2002] 2 Lloyd's Rep. 57; *The Antigoni* [1991] 1 Lloyd's Rep. 209. Also, Eder, B., *Scrutton on Charter Parties and Bills of Lading*, (Sweet & Maxwell, 22nd ed., 2011), para.20-072; Wilson, J., *Carriage of Goods by Sea*, (Pearson, 7th ed., 2010), p.190; Carr, I., *International Trade Law*, (Routledge Cavendish, 4th ed., 2010), p.240.

3.2 The Burden of Proof under the Hague/Hague-Visby Rules in General (Article IV r.1 & 2)¹⁶

For a claim of loss or damage caused by unseaworthiness, the court's approach to the burden of proof is that accepted in the common law¹⁷ system of proof.¹⁸

The rules regarding the allocation of the burden of proof under the Hague/Hague-Visby Rules, Phases 1 and 2 are summarised in *The Farrandoc*.¹⁹

Accordingly, the process of a claim of unseaworthiness consists of several phases²⁰: (a) the cargo-interests' *prima facie* case, (b) the carrier's response, (c) the displacement of the carrier's defence, and (d) the carrier's further defence.

¹⁶ Variation in the order of proof exists: see Tetley, W., *Marine Cargo Claims*, (Blais, 4th ed., 2008), pp.880-893.

¹⁷ See *Minister of Food v Reardon Smith Line Ltd* [1951] 2 Lloyd's Rep. 265, pp.271-272, per McNair J.

¹⁸ It is important to note that the Hague/Hague-Visby Rules do not contain such an explicit provision. However, under English, Canadian and US case law, the cargo-claimant is required to make a *prima facie* case, which means that the cargo-claimant has to establish its interest in the cargo; the fact that the cargo was not received at the destination in the same apparent good order and condition as loaded on board; and, the value of the transported goods lost or damaged; see *The Hellenic Dolphin* (1978) 2 Ll. Rep. 336. Also, see Diamond A., 'The Rotterdam Rules', (2009) LMCLQ, 445, p.473. For US case law: *Edouard Materne v S.S. Leerdam*, 143 F.Supp 367 (S.D.N.Y. 1956); for Canadian case law: *Kruger Inc. v Baltic Shipping Co.* [1988] 1 F.C.262 (F.C.C.).

¹⁹ *Robin Hood Flour Mills Ltd v N. M. Paterson & Sons Ltd (The Farrandoc)* [1967] 2 Lloyd's Rep (Canada Exchequer Court) 276, p.284, per Mr Justice Noel, who stated that "[t]he cargo-owner must, firstly, prove damage or loss to his cargo and as the primary obligation of the owner of the vessel is to deliver to a destination the goods of the plaintiff in like good order and condition as when shipped. Once damage or loss of the goods so shipped is established, the owner of the vessel becomes *prima facie* liable to the cargo-owner for the damages. This liability is, however, subject to any exception clause contained in the bill of lading such as that the loss or damage arises or results from an 'act, neglect, or default . . . in the navigation or in the management of the ship. If the shipowner establishes the cause of the damage or loss and that he falls within the conditions of the above exception, the owner of the cargo, in order to succeed, must then prove some other breach of the contract of carriage to which the exception clause provides no defence such as the unseaworthiness of the vessel for instance, and then the owner of the ship may establish, that notwithstanding such unseaworthiness, he is still protected by the exception clause because unseaworthiness does not give rise to a cause of action unless it consists of unfitness at the material time (which must be at the commencement of the voyage) and damage to the cargo must have been caused thereby and that such unseaworthiness occurred after the commencement of the voyage or it did not cause the loss or damage."

²⁰ Other than *The Farrandoc* explained above, see *The Polessk and the Akademik Iosif Orbeli* [1996] 2 Lloyd's Rep. 40, "(1) The burden is on the plaintiffs to prove (a) that before and at the

3.2.1 Phase One: The Cargo-Interests' Prima Facie Case²¹

As has been established by common law, and under the Hague/Hague-Visby Rules, at the first stage in an unseaworthiness (or any other) claim, the burden is on the claimant to establish a *prima facie* case against the carrier.²² The claimant must, besides showing that he is the person with the right of suit under the contract of carriage, prove that the amount and nature of loss or damage to the goods occurred while the carrier was in charge.²³ He does the latter by showing that the goods listed in the bill of lading were entrusted to the carrier in a good order and condition and that they were damaged or did not arrive at all.²⁴ The cargo-claimant, thus, raises the inference that the occurrence of loss or damage occurred during the carriage.²⁵ Such a presumption reflects Article III, r.4 of the Hague/Hague-Visby Rules.²⁶ *Prima facie*, the carrier of goods is liable; he has failed to perform his promise to deliver the goods in the same condition that they were consigned.²⁷ The evidence of proof that can be used is a clean

beginning of the voyage the vessel was either unseaworthy or improperly equipped or supplied or that at the time the holds were unfit or unsafe for the reception, carriage and preservation of the cargo and [as opposed to cargoworthiness]; (b) that the cargo was lost as a result; (2) If the plaintiffs prove (a) and (b), the defendants are liable unless they prove that the loss occurred notwithstanding the exercise of due diligence by themselves, their servants, agents or independent contractors", at p.45, per Clarke J.

²¹ A similar onus of proof falls on the claimant under other inland transport conventions; CIM (Article 6, Article 27.1); CMR (Article 9, Article 17.1); Warsaw Convention (Article 11, Article 18.1).

²² *Aktieselskabet de Danske Sukkerfabriker v Bajamar Compania Naviera SA (The Torenia)* [1983] 2 Lloyd's Rep. 210, it was stated that: "the legal burden of proof arises from the principle: *He who alleges must prove*," p.215, per Hobhouse J.

²³ See e.g. *The Amstelslot* [1962] 1 Lloyd's Rep. 539, p.545, per McNair J.

²⁴ *Albacora v Westcott & Laurance* [1966] 2 Lloyd's Rep. 53; this is also the law in the USA; *Brown & Williamson v S.S. Anghyra* (1957) 157 Fed. Supp. 737.

²⁵ *Robin Hood Flour Mills Ltd v N. M. Paterson & Sons Ltd (The Farrandoc)* [1967] 2 Lloyd's Rep. 276 at p.284.

²⁶ Article III r.4 provides that "[s]uch a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(a), (b), and (c)."

²⁷ *Great China Metal Industries Co. Ltd v Malaysia International Shipping Corp Berhad (The Bunga Seroja)* [1999] 1 Lloyd's Rep. 512, p.526, per McHugh J; *Phillips Petroleum Co. v Cabaneli Naviera SA (The Theodegmon)* [1990] 1 Lloyd's Rep. 52, pp.53-54, per Phillips J; *The Hellenic Dolphin* [1978] 2 Lloyd's Rep. 336, p.339, per Lloyd J; *Goodfellow Lumber Sales Ltd v Hovington and Verreault Navigation Inc.* [1971] 1 Lloyd's 185 at pp.186-187, per Richie J; *Robin Hood Flour Mills Ltd v N. M. Paterson & Sons Ltd (The Farrandoc)* [1967] 2 Lloyd's Rep. 276,

bill of lading.²⁸ It is apparent that, at this stage, the cargo-claimant needs merely to show the damage and the contract. He is not required to prove the cause of the loss or damage or unseaworthiness. At this moment, the claimant has provided *prima facie* evidence and Phase One ends.

3.2.2 Phase Two: The Carrier's Response – Proof of the Loss Caused by One of the Specific Exceptions

Phase Two lies with the carrier. He, in turn, may seek to meet the *prima facie* case by either pleading against the evidence of loss or damage alleged by the cargo-claimant, or by proving that the damage or loss was caused by one of the exceptions available under Article IV, r.2.²⁹ The situation nowadays is that the carrier is no longer³⁰ bound to prove that he has provided a seaworthy vessel in order to rely on such exceptions. For instance, in *The Hellenic Dolphin*,³¹ a cargo of asbestos was found on arrival to be damaged by seawater. Seawater had penetrated through the defective shell plating of the vessel, of which the

pp.283-284, per Noel J; *Albacora SRL v Westcott & Laurance Line Ltd* [1966] 2 Lloyd's Rep. 53(HL), p.63, per Lord Pearson.

²⁸ Under the Hague/Hague-Visby Rules, such presentation will be considered as *prima facie* evidence for the cargo condition. See e.g. *The River Gurara* [1998] 1 Lloyd's Rep. 225; *Naviera Mogor S.A. v Societe Metallurgique de Normandie*; *The Nogar Marin* [1988] 1 Lloyd's Rep. 412; See full discussion in Baughen, S., *Shipping Law*, (Routledge, 5th ed., 2012), pp.63-70.

²⁹ For the exceptions, see part II of this chapter, para. 3.9.2.2, at p.219-221.

³⁰ Some cases in the past required the carrier, in order to rely on the exceptions under Article IV r.2, to prove that there was no fault or negligence on his part. See e.g. *Bradley & Sons Ltd v Federal Steam Navigation Company* (1927) 27 Ll. L. Rep. 395. On discharge, the shipment of apples was found to have developed brown heart disease. The cargo-owner claimed that the cause of damage was due to the vessel's unseaworthiness because the vessel did not use a particular refrigeration system. On attempt by the carrier to rely on the exception in the bill of lading, Viscount Sumner stated that: "*the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment, and to negative negligence,*" at p.396.

³¹ *The Hellenic Dolphin* [1978] 2 Lloyd's Rep. 336; *Gosse Millerd v Canadian Government Merchant Marine* [1927] 2 K.B. 432. A cargo of tinplate was damaged while the ship sent for repairs. To carryout repairs, the hatch cover and the tarpaulins covering cargo was removed. During such repairs rainwater damaged the cargo. It was held that the damage was caused by the failure to replace the tarpaulins to prevent rain from damaging cargo. Failure to replace the tarpaulins which were related to the cargo and not the management of the vessel.

carrier had been unaware. In the absence of evidence as to whether the damage to the vessel took place before or after the cargo had been loaded, Lloyd J allowed the carrier to rely on the exception of perils of the seas since, in his opinion and in the absence of the evidence to the contrary, *‘the incursion of seawater through an undetected defect in the ship’s basic plating is a classic case of damage by perils of the sea.’*³² This might support the view that the intended construction of Article IV, r.1 is to make it clear that the carrier does not have to prove due diligence before he is allowed to invoke an exception.³³ In some civil law countries,³⁴ this feature, which has been inherited from English law,³⁵ is not followed at all.

Finally, it should be added at this point that if the loss or damage was attributed to more than one cause, i.e. to concurrent causes of which one was unseaworthiness and the other was one of those listed under Article IV, r.2, the position of the cargo-claimant would be ameliorated. This may enable the court

³² *The Hellenic Dolphin* [1978] 2 Lloyd’s Rep. 336, p.339, per Lloyd J.

³³ See *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd’s Rep. 265, where it was stated that: “it seems to me that if one treats the matter purely as a matter of contract, the second sentence in Article IV r.1 strongly supports the submission made on behalf of the ship that no onus as to seaworthiness is cast on the shipowner, except after proof has been given by the other party that the damage has resulted from unseaworthiness,” p.272, per McNair. Also, Carver states that “[i]t cannot mean that if the seaworthiness duty is not first proved to have been complied with, the exceptions of Article IV cannot be invoked at all whether or not the damage occurred in connection with unseaworthiness...rather, it must mean that if Article III (1) is not fulfilled and the non-fulfilment causes the damage the immunities of Article IV cannot be relied on.” Treitel, G., and Reynolds F., *Carver on Bills of Lading*, (Sweet & Maxwell, 3rd ed., 2011), para. 9.241.

³⁴ Clarke, M., ‘The Carrier’s Duty of Seaworthiness under the Hague Rules’ cited as Chapter 6 of Rose, F. D. (ed.) *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (LLP, 2000), p.106. For the contrary approach under the Dutch law, see Margetson, N., *The system of liability of articles III and IV of the Hague [Visby] Rules*, (Paris Legal Publisher, 2008), p.178.

³⁵ Most courts in the US also take a view similar to that in England. See: *Isbrandtsen Co. v Federal Ins Co.* (1952) 113 F. Supp.357 (S.D.N.Y.); *Irish Spruce* [1976] 1 Lloyd’s Rep. 63, p.72, per Goettel J. (S.D.N.Y.).

to avoid the full effect of shifting the burden of proof back to the cargo-claimant.³⁶

3.2.3 Phase Three: Proof of Unseaworthiness – The Claimant's Burden

In this phase of the claim process, the claimant might defeat the carrier's reliance on Article IV, r.2. The claimant can still rebut the pleaded defence (excepted peril) by providing evidence to demonstrate that the defect, which occurred before and at the beginning of the voyage, caused the loss or damage.³⁷ In other words, the claimant, at this stage must provide the relevant evidence in order to show unseaworthiness. This means that the claimant bears the risk associated with a potential lack of evidence. Nevertheless, how difficult is it to prove that someone else's vessel is unfit for the contemplated voyage?

3.2.3.1 The Difficulties Facing the Cargo-claimant at Phase Three

In unseaworthiness claims, the availability of evidence is of such significance that it may affect the outcome of the dispute. This is particularly true in cases where it is difficult for the cargo-claimant to obtain evidence. The cargo-claimant, mainly due to his limited access to the relevant facts, faces several difficulties in his effort to prove the unfitness of the vessel. First, the required standard of proof of unseaworthiness is not very clear and it seems that the standard of evidence is not merely a suggestion of a particular fact; otherwise, the claimant would need neither effort nor wit to put the carrier in a difficult position.³⁸ It may

³⁶ See para. 3.11.1, at p.257.

³⁷ *Great China Metal Industries Co. Ltd v Malaysia International Shipping Corp Berhad (The Bunga Seroja)* [1999] 1 Lloyd's Rep. 512, p.526, per McHugh J; *Phillips Petroleum Co. v Cabanelli Naviera SA (The Theodegmon)* [1990] 1 Lloyd's Rep. 52, pp.53-54, per Phillips J; *The Hellenic Dolphin* [1978] 2 Lloyd's Rep. 336, p.339, per Lloyd J.

³⁸ Clarke, M., *Aspects of Hague Rules*, (Martinus Nijhoff, 1976), p.177.

be possible to say that the standard of evidence to persuade the court, on a balance of probabilities,³⁹ might be set relatively high. In *Cosmopolitan Shipping v Hatton & Cookson*,⁴⁰ in the Court of Appeal, Greer LJ stated that the cargo-claimant must ‘give evidence which makes it quite certain that the vessel was unseaworthy. All he needs to do is to give evidence which establishes unseaworthiness beyond the reach of reasonable doubt. If the evidence merely raises a suspicion, or if it goes beyond suspicion but leaves in the mind of the tribunal a reasonable doubt whether unseaworthiness is established, the cargo-owner alleging unseaworthiness fails’.⁴¹ Clarke⁴² indicates that Greer LJ’s view⁴³ in *Cosmopolitan Shipping v Hatton & Cookson* was rejected in Canada⁴⁴ and that his view is neither realistic nor consistent with current legal trends. Clarke supports the better view of Scrutton LJ which creates a lesser degree of burden on the claimant to prove unseaworthiness.⁴⁵ This difficulty is associated with other problems, such as the time and location of the occurrence. Perhaps, in order to prove unseaworthiness, it would be easier to trace evidence of a vessel that trades long distance, taking her days to arrive at the discharge port as

³⁹ Certain jurisdictions have different approaches to the principle of ‘balance of probabilities’. The required standard of evidence to defeat the proof of the carrier is lesser than that used by the English court. For further information regarding the standard of evidence, see Wright, R., ‘Proving Causation: Probability versus Belief’, cited as Chapter 10 in Goldberg, R., *Perspectives on Causation*, (2011, Hart Publishing), pp.195-220.

⁴⁰ *Cosmopolitan Shipping v Hatton & Cookson* (1929) 35 Ll. L. Rep. 117. The vessel was abandoned and sank. The cargo-owners contended that, on the ground that the sails were insufficient in number and not of good quality, the vessel was unseaworthy at the commencement of the voyage as a counterclaim to one-half of the freight that was payable on shipment.

⁴¹ *Cosmopolitan Shipping v Hatton & Cookson* (1929) 35 Ll. L. Rep. 117, p.128, per Greer LJ, applied by the Canadian court in *Western Canadian Steam Ship v Canadian Commercial Corp.* (1958) 14 D.L.R. (2d.) 487.

⁴² Clarke, M., *Aspects of Hague Rules*, (Martinus Nijhoff, 1976), p.177.

⁴³ *Cosmopolitan Shipping v Hatton & Cookson* (1929) 35 Ll. L. R. 117, at p.128.

⁴⁴ Canadian cases cited by Clarke; *De Carvalho v Kent Line* (1951) 32 M.P.R. 282, at p.300. “To put the shipper to the task of proving unseaworthiness beyond reasonable doubt is virtually to render the due diligence provision in the Act a nullity and meaningless. That stage would never be reached.” per Winter J.

⁴⁵ Finding of Scrutton is that it is adequate for the court to feel that the vessel was unseaworthy at the commencement of the sailing, Clarke, M., *Aspects of Hague Rules*, (Martinus Nijhoff, 1976), p.177.

opposed to a vessel which trades over a fairly short distance. The longer the time between the unseaworthiness occurrence and the time at which the vessel arrives at her port of discharge, the more difficult it is to discover evidence of unseaworthiness.⁴⁶

Secondly, the cargo-claimant's burden is not always easy. In the past, it may have been difficult to prove that the vessel, belonging to someone else who had exclusive access to all the necessary information,⁴⁷ was unseaworthy at a specific time and stage if the court was not willing to make certain inferences. The cargo-claimant has to face circumstances where the cargo, as from the time of its delivery, is in the hands of the carrier and/or his servants whilst the cargo-claimant (particularly when this is the consignee as opposed to the shipper) has little opportunity, if any at all, of knowing what took place during the time with reference to which he must prove the unseaworthiness; that is, before and at the beginning of the voyage.⁴⁸

The current law does not take into consideration the difficulties faced by the cargo-claimant. For instance, in *Minister of Food v Reardon Smith Line*,⁴⁹ the officer of the vessel negligently gave instructions to top up the ballast tanks

⁴⁶ See Maclean, I., 'Secure the evidence' (19 Oct. 12), MRI, at pp.1-2.

⁴⁷ In *Levison v Patent Steam Carpet Cleaning Co. Ltd* [1978] Q.B. 69, Sir David Cairns stated: "However difficult it may sometimes be for a bailee to prove a negative, he is at least in a better position than the bailor to know what happened to the goods while in his possession," p.85.

⁴⁸ *Encyclopaedia Britannica Inc. v S.S. Hong Kong Producer* [1969] 2 Lloyd's Rep. 536, p.543 (2nd Cir. 1969). The Second Circuit declared such difficulties when stating that: "[i]t is almost impossible for the shipper to prove that the carrier was negligent or lacked due diligence because as a practical matter, all evidence on those issues is in the carrier's hands."

⁴⁹ *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep. 265; see also *The Kriti Rex* [1996] 2 Lloyd's Rep. 171. The vessel's engine suffered a problem and stopped during the voyage. The cargo was of a perishable type that could not reach its destination because of the prolonged delay; it was given away at the port of repair. It was argued that the carrier was in breach of Article III r.1. Moore-Bick J stated that the cargo-claimant must satisfy on the balance of probabilities that the damage was caused by unseaworthiness by stating that the claimant should determine the exact defects which caused the failure of the engine. See also *The Danica Brown* [1995] 2 Lloyd's Rep. 264; *The Subro Valour* [1995] 1 Lloyd's Rep. 509; *The Antigoni* [1991] 1 Lloyd's Rep. 209; *Union of India v Reederij Amsterdam* [1963] 2 Lloyd's Rep. 223.

without making sure that the opening lids were shut. As a result, the cargo was damaged by ballast water. The charterer brought a claim on the basis that there was unseaworthiness in the act of not closing the opening of the ballast tank before the commencement of the voyage. The shipowner relied on Article IV, r.2(a) exempting their servant's negligence in the navigation and management of the ship. The charter incorporated the Hague Rules.⁵⁰ McNair J⁵¹ held that, once the owner asserted the exemption, the onus shifted to the charterer to establish that unseaworthiness was the cause of the loss.

Further, as argued in Chapter Two, the carrier is not liable for cargo loss or damage that has been caused by the unfitness of the vessel until the vessel is under his 'orbit'.⁵² This might be a fair law that caters for the absence of the carrier's fault until the minute the carrier has control over the vessel and applies his own system of exercising due diligence, i.e. after inspecting and ascertaining the status of the vessel so that he has knowledge of any defect (unfitness) that might cause loss or damage. If this means that the obligation of exercising due diligence (in detecting and, if necessary, rectifying matters bearing on seaworthiness) comes into being only when the vessel is in the carrier's orbit, then by analogy, the vessel is never within the 'orbit' of the cargo-

⁵⁰ The provisions on proof are the same under the Hague/Hague-Visby Rules. When COGSA 1971 is incorporated into time or voyage charters as paramount terms, the seaworthiness obligation provided by COGSA will prevail over either the common law absolute seaworthiness warranty (if so implied under the charters) or the seaworthiness obligation imposed by other express charter terms. See *The Fjord Wind* [2000] 2 Lloyd's Rep. 191.

⁵¹ *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep. 265, p.272. McNair J held that "...the second sentence in Article IV r.1 strongly supports the submission made on behalf of the ship that no onus as to seaworthiness is cast on the shipowner, except after proof has been given by the other party that the damage has resulted from unseaworthiness."

⁵² See *Riverstone Meat Co. v Lancashire Shipping Co. (The Muncaster Castle)* [1961] A.C. 807, per Lord Radcliffe at p.867; *The Happy Ranger* [2006] EWHC 122, [2006] 1 Lloyd's Rep. 649. The 'carrier' in this instance should be considered as the commercial and legal shipowner but not the carrier who is not the owner. The vessel is considered within his orbit only at the time she is delivered to him and not beforehand.

interests and thus, the status of the vessel, i.e. the unseaworthiness of the vessel, is beyond the cargo-interests' knowledge.⁵³

Insofar as the burden of proof for a claim under a bill of lading is concerned,⁵⁴ most of the mentioned cases are considered in light of the common law principle that is based on *The Glendarroch* case.⁵⁵

In that case, the Court of Appeal accepted the argument of the defendants and ruled that "the law is clear that the burden of proving this negligence lies upon the plaintiff".⁵⁶

According to the principle established by *The Glendarroch* and followed subsequently in later judgments,⁵⁷ the carrier has no initial burden of proving that he was not negligent. In light of the practicality of obtaining evidence to discharge the burden of proof, as outlined above, one would naturally ask what would be the possible solution for such a harsh burden.

⁵³ Shore-based equipment (shore cranes or floating cranes) is not a part of the vessel and thus, they are never within the 'orbit' of the carrier. The carrier must have recourse against whoever supplies this equipment so that, in the final analysis, the injured party would recover and the party at fault would fund the recovery. This is in the case where the carrier undertakes the performance of cargo handling causing damage outside his 'orbit'. See Cooke J., *Voyage Charters*, (Informa, 3rd ed., 2007), para. 85.344.

⁵⁴ Additionally, a charterparty that incorporates the Hague/Hague-Visby Rules and its burden of proof. However, the dispute should have arisen from a contract containing FIO, bringing the loading and unloading operations as well as the equipment used, within the orbit of the carrier.

⁵⁵ *The Glendarroch* [1894], P.226. In this case, the claimants' cargo of cement cases was loaded on board the defendant's steamship under a bill of lading which accepted the usual perils, but not negligence. After the stranding of the vessel, all the cement cargo was damaged by seawater. In an action for damage, the defendant relied on the exception of perils of the sea, while the claimant argued that the exception was brought about by negligence on the part of the defendant. At first instance, Sir F. H. Jeune ruled that the carrier in order to be excused had to prove that the peril of the sea was not occasioned by their negligence.

⁵⁶ *The Glendarroch* [1884], P.226, p. 233, per Lord Esher M.R.

⁵⁷ See i.e., *The Torenia* [1983] 2 Lloyd's Rep. 210, for an opposing approach to *The Glendarroch* (that upon establishing the peril of the sea, the burden shifted to the plaintiffs to prove their lack of due diligence to make the vessel seaworthy); see further, *The Tasman Pioneer* [2010] NZSC 37; *The Bunga Seroja* [1999] 1 Lloyd's Rep. 512 (Australia); *The Kriti Rex* [1996] 2 Lloyd's Rep. 171; *The Danica Brown* [1995] 2 Lloyd's Rep. 264; *The Subro Valour* [1995] 1 Lloyd's Rep. 509; *The Amigoni* [1991] 1 Lloyd's Rep. 209; *Union of India v N.V. Reederij Amsterdam* [1963] 2 Lloyd's Rep. 223, at p.235; Cf. *The Yamatogawa* [1990] 2 Lloyd's Rep. 39.

Given that the Hague/Hague-Visby Rules make no specific stipulation as to who bears the burden of proof of fault when the carrier claims an exemption under Article IV, r.2, courts are not restricted to any particular approach, i.e. as regards the current burden of proof in proving unseaworthiness.

3.2.3.2 Possible Solutions

There is no binding English decision as to the application of *The Glendarroch* to the Hague/Hague-Visby Rules,⁵⁸ or as to whether other principles should or should not be applied. Thus, in order to reach a solution, the matter is open to the court to change its approach. One solution to this problem is for the court to make an inference as to the unseaworthiness of the vessel. However, this is limited to the fact that the carrier cannot prove the unseaworthiness of the vessel. Thus, the court could take one of these possible approaches: a) following the principles of, or similar to, bailment; and, b) rebutting the existence of the peril.

- The Inference of Unseaworthiness – A Life Buoy for the Claimant

Given that “*the carrier is not obliged to produce watertight evidence of the causal connection between the loss and the exempted occurrence*,”⁵⁹ the court may have to decide on the basis of weak or lacking evidence either that the carrier satisfied the burden of proof; that there are sufficient doubts for the court

⁵⁸ See *The Torenia* [1983] 2 Lloyd's Rep. 210 per Hobhouse J. It was there stated that: 'No authority was cited to me as being binding on me with regard to a Hague Rules contract' at p.217. Although the case *Albacora S.R.L. v Westcott & Laurance Line Ltd* [1966] 2 Lloyd's Rep. 53, is a House of Lords' case, but it does not represent a decision on the point. For this point, see Ezeoke, C., 'Allocating onus of proof in sea cargo claims: the contest of conflicting principles', [2001] LMCLQ 261, p.275.

⁵⁹ Karan, K, *The Carrier's Liability under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules*, (The Edwin Mellen, 2005), p.331. See also Ezeoke, C., 'Allocating onus of proof in sea cargo claims: the contest of conflicting principles', [2001] LMCLQ 260, p.273.

to raise an inference of unseaworthiness⁶⁰; or, that the loss or damage is traced backed to the period before or at the beginning of the voyage.⁶¹ Should the claimant succeed in the latter, he will discharge the burden of proof.

It is submitted that the court⁶² is quite prepared to draw an inference (and rather willing to favour the cargo-claimant in this respect) even if the evidence adduced by the claimant is not adequate, provided that the carrier is not able to demonstrate the exercise of due diligence before and at the beginning of the voyage.⁶³ However, one cannot consider the inference principle as a solution; it is limited to particular incidents calling for a presumption of unseaworthiness and/or the timing of such presumed unseaworthiness to which courts pay particular attention when deciding their case.⁶⁴

⁶⁰ See Wilson, J., *Carriage of Goods by Sea*, (Pearson, 7th ed., 2010), p.191. The author stated that seawater in a vessel's hold is one way to infer unseaworthiness. He suggests that the problem of burden of proof on the part of the cargo-claimant is frequently solved by the readiness of the court to treat some facts as a *prima facie* evidence of unseaworthiness.

⁶¹ *The Assunzione* [1956] 2 Lloyd's Rep. 468.

⁶² *The Amstelslot* [1963] 2 Lloyd's Rep. 223. Claiming that in practice the burden on the plaintiff must be light. Lord Devlin stated that the "*proof of unseaworthiness fulfils...the same function in this type of case as res ipsa loquitur does in the ordinary case of negligence*," p.235.

⁶³ *Phillips Petroleum Co. v Cabanelli Naviera (The Theodegmon)* [1990] 1 Lloyd's Rep. 52. In this case, the vessel was navigating in a river and ran aground. As a result, the cargo was damaged. The carrier contended that the grounding happened due to perils of the seas. The claimant did not submit adequate evidence to prove the unseaworthiness and submitted that not all strandings were caused by perils of the seas. The lack of frankness on the part of the defendants and of their witnesses in relation to what had gone wrong with the steering system in the past induced the court to infer the unseaworthiness of the vessel. The carrier, however, was not able to prove the exercise of due diligence at and before the commencement of the voyage. Phillips J stated that: "*the inference of unseaworthiness at the commencement of the voyage was overwhelming. But if, at the end of the day, having heard all the evidence and drawn all the proper inferences, the Court is left on the razor's edge, the cargo-owner fails on unseaworthiness and the shipowners are left with their defence of perils of the sea. If, on the other hand, the Court comes down in favour of the cargo-owners on unseaworthiness, the shipowners can still escape by proving that the relevant unseaworthiness was not due to any want of due diligence on their part or on the part of their servants or agents*", p.54, as per Phillips J. See also *Fyffes Group Ltd v Reefer Express Lines Pty (The Kriti Rex)* [1996] 2 Lloyd's Rep. 171. Also see *Eridania SpA v Rudolf A Oetker (The Fjord Wind)* [1999] 1 Lloyd's Rep. 307(Q.B.); aff'd [2000] 2 Lloyd's Rep. 191 (C.A.).

⁶⁴ These are usually: (i) technical evidence which would indicate to the court that there is a defect in design and in which case no further evidence would be required (See for instance, *Angliss and Co. Proprietary Ltd v Peninsular and Oriental Steam Navigation Co.* [1927] 2 K.B. 456); (ii) weather conditions from the minute the vessel began her voyage until the time that the damage occurred (*Cosmopolitan Shipping Co. v Hatton & Cookson (The Rotellan)* (1929) 35 Ll. L. Rep. 117; *The Assunzione* [1956] 2 Lloyd's Rep. 468 – in the latter case, the steering gear that

The suggested approach would be for the court to follow a view similar to Scrutton LJ's finding in *Cosmopolitan Shipping v Hatton & Cookson*⁶⁵; that is, it is enough for “the court to feel that it looks as if the ship had been unseaworthy on sailing”,⁶⁶ and that, on the balance of probabilities, the claimant has discharged his burden of proving his point.⁶⁷ This, arguably, is the approach adopted by the Rotterdam Rules. However, the language of Article 17(5)(a)⁶⁸ of the Rotterdam Rules appears clear with regard to the word ‘probably’ that operates only as to the proof of causation related to unseaworthiness but not to the unseaworthiness itself.⁶⁹ There is no equivalent to Article 17(5) of the Rotterdam Rules in the Hague/Hague-Visby Rules.

- Shifting the Burden to the Defendants – The Bailment Approach⁷⁰

broke down after three days of sailing in calm weather gave rise to the assumption that it was defective when the vessel commenced the voyage); (iii) records of the ships, i.e. those maintained for a ship and/or a company under the requirements of the ISM and ISPS Codes might be valued as evidence (see, for example, *CHS Inc Iberica SL and Another v Far East Marine SA (The Devon)* [2012] EWHC 3747 (Comm)).

⁶⁵ *Cosmopolitan Shipping v Hatton & Cookson* (1929) 35 Ll. L. R. 177 cited in Clarke, M., *Aspects of The Hague Rules: A comparative study in English and French Law*, (Martinus Nijhoff- The Hague, 1976), at p.177

⁶⁶ Ivamy, ‘Liability of cargo damage’, (1959) 12(1) Current Legal Problems, 208-223, p.214, Who referred to Scrutton LJ in *Cosmopolitan Shipping v Hatton & Cookson* (1929) 35 Ll. L. R. 177 cited in Clarke, M., *Aspects of The Hague Rules: A comparative study in English and French Law*, (Martinus Nijhoff- The Hague, 1976), at p.177

⁶⁷ Clarke, M., *Aspect of The Hague Rules*, (Martinus Nijhoff, 1976), p. 177. See above discussion related to this point at para. 3.2.3.1, p 178

⁶⁸ Article 17(5)(a) provides: “The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which goods are carried, or any containers supplied by the carrier in or upon which goods are carried, were not fit and safe for reception, carriage, and preservation of the goods.”

⁶⁹ For further discussion on the probability of causation see Part II of this Chapter.

⁷⁰ The law of bailment imposes upon bailees a duty of care and this duty would be subject to the terms (contractual or otherwise) on which the bailee had accepted the goods. This is known as bailment on terms. The claimant cargo-interest may be compelled by the circumstances to sue on bailment on terms instead of on the contract of carriage, particularly in a situation where the claimant received a charterer's bill, where he has made a contract with a charterer but then wishes to sue the shipowner (thus no contract with the owner- the bailment on terms). See *Elder Dempster & Co Ltd v Paterson Zochonis & Co Ltd* [1924] A.C. 522. The shipowner, in the *Elder* case, could rely on the limitation of liability clauses in the charterer's bill in defending a suit by

The bailment approach as a solution was proposed and discussed in detail by Ezeoke.⁷¹ It would be sensible to draw the difference between a legal and an evidential burden. The evidential burden is said to include “going forward in argument in the course of trial. It embraces the tactical obligation to lead counter evidence against a proponent’s adduction of evidence...This approach leaves the claimant with a legal burden to prove that the carrier is at fault. On the other hand, the substantive law on a subject dictates the allocation of the legal burden. It is borne by the party who bears the risk of non-persuasion on any given proposition...such risk of non-persuasion to negative fault is born by the carrier as a bailee in the bailment approach [which is used by some cases].”⁷² The nature of proof in bailment is that when the bailor shows the loss or damage he suffered from the bailee,⁷³ it is the bailee who should show that he exercised reasonable care and that the loss or damage occurred without his fault.⁷⁴ For example, in *Coldman v Hill*,⁷⁵ a shepherd made no attempt to recover his stolen cattle. The decision of the divisional court that the cattle owner had to prove the fault of the shepherd was reversed. It was ruled that it

the cargo-interest (the shipper in this case). In light of the Himalaya clause, which protects the shipowner for limitation of liability, the court would not extend the terms of the original contract to matters such as jurisdiction or choice of law when the owner is being sued in bailment. Any clause that derogates the obligations of the carrier would be nullified by Article III, r.8. (see *The Starsin* [2003] UKHL 12).

⁷¹ Ezeoke, C., ‘Allocating onus of proof in sea cargo claims: the contest of conflicting principles’, [2001] LMCLQ 261, pp.264, 271-272.

⁷² Ibid, p.261. Note that Ezeoke in f.n. 1 of his article has referred to Colin Tapper (ed.), *Corss & Tapper on Evidence*, 9th ed. (London, 1999), 115- 120, indicating that: “*The terminology used to describe the two senses of burden of proof is not uniform. The factual, provisional and tactical burdens are variations of the evidential burden, whereas, the ‘risk of non-persuasion’, the ultimate, and the fixed burdens describe the legal burden.*”

⁷³ Bailment involves the transfer of possession in law in the goods by the bailor to the bailee (the bailee in carriage of good cases is often the carrier). The legal possession does not necessary involve the physical possession of the goods. See *Spectra International v HayesOak* [1997] 1 Lloyd’s Rep. 153.

⁷⁴ *Gledstane v Hewitt* (1831) 1 C. & J. 565.

⁷⁵ *Coldman v Hill* [1919] 1 K.B. 443.

was the shepherd's onus to prove the exercise of reasonable care.⁷⁶ This indicates that once the bailor proves to the court his loss or damage, there is *prima facie* liability and the burden shifts to the bailee to absolve himself.⁷⁷ In such a case, the cargo-owner constructs a *prima facie* case of liability against the carrier by proving that the cargo was shipped in good order and lost or undelivered. The carrier must then exonerate himself by proving that the exclusion he relied on was not caused by any fault of his own. A very similar approach was expressed, soon after the Hague Rules came into existence, at first instance in *Gosse Millard v Canadian Government Merchant Marine Ltd.*⁷⁸ The carrier invoked the exception of negligent management of the ship under Article IV, r.2(a) of the Hague Rules. The cargo-owner argued that the carrier had failed to care for the cargo and he had breached Article III, r.2. Wright J stated that *'it is enough if the owner of the goods proves either that the goods have not been delivered, or have been delivered damaged. The carrier is a bailee and it is for him to show that he has taken reasonable care of the goods*

⁷⁶ *Coldman v Hill* [1919] 1 K.B. 443, where Bankes LJ stated that "*the law still is that if the bailee is sued in detinue only, it is a good answer for him to say that the goods were stolen without any default on his part, as the general bailment laid in the declaration pledges the plaintiff to the proof of nothing except that the goods were in the defendant's hand and were wrongly detained.*" Cited in Ezeoke, C., 'Allocating onus of proof in sea cargo claims: the contest of conflicting principles', [2001] LMCLQ 261. P. 263.

⁷⁷ Ezeoke, C., 'Allocating onus of proof in sea cargo claims: the contest of conflicting principles', [2001] LMCLQ 261, p.275. Ezeoke referred to the summarised principle of Denning LJ in *J. Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461. He has stated that: "*A bailor, by pleading and presenting his case properly, can always put on the bailee the burden of proof. In the case of non-delivery for instance, all he need plead is the contract and the failure to deliver on demand. That puts on the bailee the burden of proving either loss without his fault (which of course, would be a complete answer at common law) or, if it was due to his fault, it was a fault from which he is excused by the exempting clause...likewise, with goods which are returned by the bailee in a damaged condition, the burden is on him to show that the damage was done without his fault; or that, if the fault was there, it was excused by the exempting clause.*"

⁷⁸ *Gosse Millard v Canadian Government Merchant Marine Ltd* [1927] 2 K.B. 432. The same approach was followed in *The Torenia* [1983] 2 Lloyd's Rep. 210. In the latter case, the vessel's shell plating failed, causing a leak. Subsequently, a list developed and the vessel was abandoned. The plaintiff argued that the vessel was unseaworthy. The carrier contended that, according to *The Glenddaroch*, the burden shifted to the claimant to prove the lack of due diligence to prove unseaworthiness of the vessel. Hobhouse J rejected this and stated that: "*the carrier has to prove that he had exercised due diligence to make the ship seaworthy...*" p.219.

while they have been in his custody (including the custody of his servant) and to bring himself, if there be loss or damage, within the specific immunities'.⁷⁹

Ezeoke points out that this principle of bailment can be used in incidents where the carrier is in breach of the due diligence obligation to provide a seaworthy vessel, thus placing the sea carrier in the same position as other bailees, thereby requiring him to prove due diligence in respect of seaworthiness.⁸⁰

It is to be noted that, along with the many general warnings as to the dangers of assuming that the international conventions should be construed in light of earlier English decisions,⁸¹ the current authors of Carver⁸² have recognised a need for change that is similar to the bailment approach rather than the rule derived from *The Glendarroch*.⁸³ However, the learned authors observe that the majority of authorities,⁸⁴ including *obiter dicta* in the House of Lords,⁸⁵ favour the aforementioned view of Scrutton.⁸⁶ Subsequent authorities have expressed doubts about the principle that derived from *The Glendarroch*.⁸⁷ As discussed

⁷⁹ *Gosse Millerd v Canadian Government Merchant Marine Ltd* [1927] 2 K.B. 432, pp.434-436.

⁸⁰ Ezeoke, C., 'Allocating onus of proof in sea cargo claims: the contest of conflicting principles', [2001] LMCLQ 261, at p.274.

⁸¹ E.g. *Stag Line Ltd v Fasco Mango & Co. Ltd* [1932] A.C. 328 at p.342, per Lord Atkin; *James Bunchanan & Co. Ltd v Babco Forwarding & Shipping Co Ltd* [1978] A.C. 141, p.152, per Lord Wilberforce.

⁸² Treitel G. and Reynolds F., *Carver on Bills of Lading*, (Sweet & Maxwell, 3rd ed., 2011), para.9.243. See also Schoenbaum T., *Admiralty and Maritime Law* (2nd ed., 1994, St Paul), at p.569; a similar proposal by Tetley, W., *Marine Cargo Claims*, (Blais, 4th ed., 2008), p.890-891.

⁸² Treitel, G. and Reynolds, F. M., *Carver on Bills of Lading* (Sweet & Maxwell, 3rd ed., 2011), para. 9.243.

⁸³ Treitel, G. and Reynolds, F. M., *Carver on Bills of Lading* (Sweet & Maxwell, 3rd ed., 2011), para. 9.243.

⁸⁴ The common law principle is well established and some courts continue to adopt it; *Milan Nigeria Ltd v Angeliki B Maritime Co.* [2011] EWHC 892 (Comm); *The Tasman Pioneer* [2010] NZSC 37; *The Bunga Seroja* [1999] 1 Lloyd's Rep. 512; *The Kriti Rex* [1996] 2 Lloyd's Rep. 171; *The Danica Brown* [1995] 2 Lloyd's Rep. 264; *The Subro Valour* [1995] 1 Lloyd's Rep. 509; *The Antigoni* [1991] 1 Lloyd's Rep. 209.

⁸⁵ *Albacora v Westcott & Laurance* [1966] 2 Lloyd's Rep. 53, pp.61 and 64.

⁸⁶ See Eder, B., *Scrutton on Charterparties and Bills of Lading*, (Sweet & Maxwell, 22nd ed., 2011), para.20-073.

⁸⁷ *The Torenia* [1983] 2 Lloyd's Rep. 210, p.219, per Hobhouse J; *The Starsin* [2004] 1 A.C. 571. A parcel of timber was progressively damaged on voyage because of negligent stowage before the voyage began. Charterer bills of lading were issued. It was stated that "*the cargo owners could, by relying upon the goods owner/sub-bailee relationship, have put the burden on the*

above, the current principle creates difficulties for the claimant regarding matters particularly within the knowledge of the carrier. Moreover, the carrier is more knowledgeable (despite not being an expert) in terms of sea carriage technicalities than the cargo-claimant. Therefore, it would be logical if the burden of proving seaworthiness is imposed on the party who is obliged to exercise due diligence to provide a seaworthy vessel, i.e. someone who knows best what he did or did not do towards the discharge of his obligation to exercise due diligence.

- **Rebutting the Existence of the Peril**

An alternative route would be two consecutive contests immediately following each other. In the first, the burden is on the carrier who invokes the excepted peril. In the second, it is on the cargo-claimant to simply disprove the existence or causal connection of the excepted peril invoked by the carrier rather than showing that the vessel departed in an unseaworthy condition.⁸⁸ There may be situations where it would be easier for the cargo-claimant to rebut either the existence of the peril or the causal connection between the peril and the loss.⁸⁹ This might strike a better balance between the claimant and the carrier when

shipowners to excuse their failure to deliver the goods undamaged. But at the trial they did not. They relied upon a Donoghue v Stevenson claim and had to discharge the burden of proof which that entailed, at [138], per Lord Hobhouse of Woodborough. See also *Svenska Trakto Aktiebolaget v Maritime Agencies (Southampton) Ltd* [1953] 2 Q.B. 295, p.303, per Pilcher J (citing the 9th ed. of Carver); *Great China Metal Industries Co. Ltd v Malaysian International Shipping Corp Bhd (The Bunga Seroja)* (1998) 196 C.L.R. 161, pp.171-172. American cases: e.g. *The Tuxpan* (1991) 765 F.Supp. 1150, p.1173 (S.D.N.Y.).

⁸⁸ If the claimant fails to rebut such exclusion, he is left with an alternative approach as to establish the unseaworthiness of the vessel. This proposition would be, however, subject to procedural rules of the *lex fori*.

⁸⁹ Tetley W., *Marine Cargo Claims*, (Blais, 4th ed., 2008), pp.934 and 965. See also Margetson N., *The system of liability of article III and IV of the Hague [Visby] Rules*, (2008, Paris Legal Publisher), pp.180-181.

the claimant has a difficulty⁹⁰ in proving unseaworthiness or in situations where no such inference can be drawn by the court.⁹¹ It is submitted that rebutting or raising merely an uncertainty as to the peril invoked by the carrier should act in favour of the cargo-claimant notwithstanding that the cargo-claimant was unable to prove a breach of Article III, r.1.⁹²

It could not be known whether an English court, without a precedent on this point, would adopt such an approach. However, this was, for example, the approach of the American court in *New Rotterdam Insurance Co. v S.S. Loppersum*.⁹³ In this case, the cargo was lost during the voyage. The cargo-claimant made a *prima facie* case for the loss but the carrier contended that the loss was caused by perils of the seas adducing evidence that the weather was force nine. The cargo-claimant contradicted the carrier's evidence by introducing evidence by means of weather reports issued by the US Weather Bureau to the effect that the weather was force seven. The court accepted the reports of force seven and the carrier was found liable. This view suggests that it should be sufficient for the cargo-claimant to raise doubts as to the cause of damage if he is to discharge his burden of proving the unseaworthiness of the vessel. The main aim is to ease the onus on the claimant by providing an alternative route to proving unseaworthiness. Consequently, one should not look at this proposition as if it is prolonging the stages of the burden of proof.

⁹⁰ This might depend on the standard of proof that affects the balance of probabilities. Thus, the evidence adduced by the claimant must persuade the judge that it is more probable than not on the facts that the carrier asserts to invoke the excepted peril. See Tapper C., *Cross and Tapper on Evidence*, (Oxford University Press, 11th ed., 2007), pp.171-172.

⁹¹ See above, *The Hellenic Dolphin* [1978] 2 Lloyd's Rep. 336.

⁹² Simon Baughen, *Shipping Law*, (Routledge, 5th ed., 2012), p.116.

⁹³ See *New Rotterdam Ins Co. v S.S. Loppersum* 215 F. Supp 563, 1963 AMC 1758 (S.D.N.Y. 1963). See also *Freeman & Slater v M. V. Tofevo* 222 F. Supp 964, 1963 AMC 1758 (S.D.N.Y.1963). (Signs such as absence of proof of proper stowage, damage to the vessel and the speed of the vessel in comparison to other vessels' speed in the vicinity gives indication that unexplained alterations in the log book prevented the carrier from demonstrating that the storm encountered was not a peril of the seas).

The court would look at and examine all the relevant facts after all the evidence has been adduced and it would then apply the balance of probabilities approach. In the eyes of the court, in some occasions it probably would not matter as to where the onus of proof originally lay.⁹⁴

It is suggested that the burden of proof should be divided as follows:⁹⁵

- The cargo-claimant makes a *prima facie* case by providing a clean bill of lading and evidence for loss or damage.
- The carrier then invokes an exclusion by proving that the damage was caused by an excepted peril.
- The cargo-claimant will have the burden to (i) disprove the existence of the peril; or (ii) rebut the causal connection between the peril and the damage. The casting of doubt on the defence raised by the carrier, i.e. that the loss or damage was not caused by the excepted peril (or by any of the exempted causes) invoked by the carrier would ease the difficult burden on the claimant.
- If the carrier succeeds in proving that the damage was caused by an excepted peril, the cargo-claimant can also try to prove that the damage was caused entirely or partially by unseaworthiness.
- The burden is moved back to the carrier to prove that he exercised due diligence before or at the beginning of the voyage to provide a seaworthy vessel.

⁹⁴ It was shown above that, as far as English courts are concerned, the standard of proof is on the balance of probabilities. See *McWilliams v Arroll* [1962] 1 WLR 259, p. 307, where Lord Reid stated: “*when all the evidence has been brought out, it rarely matters where the onus of proof originally lay, the question is which way the balance of probability has come to rest.*”

⁹⁵ See generally Ezeoke, C., ‘Allocating onus of proof in sea cargo claims: the contest of conflicting principles’, [2001] LMCLQ 261. Also see the reference made to the same article with regards to the evidential and legal burden.

Article IV, r.1, of the Hague/Hague-Visby Rules provides that “[w]henver loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article”. However, the Rules make no specific stipulation on who bears, at the outset, the burden of proof as to the vessel’s unseaworthiness (or seaworthiness) when the carrier claims an exemption under Article IV, r.2. This may mean that the position is not at variance with the common law approach; thus the court could apply the same. Unless, therefore, the Rules are redrafted to stipulate in clear language the order of proof and where the burden of proof lies, the court can, arguably, follow an approach similar to that in bailment.⁹⁶

If, for any reason, the above propositions are not considered applicable, it could be suggested that in order to address the difficulties faced by the claimant, a contractual provision should be agreed in the contract of carriage that imposes an obligation on the parties (or the carrier) to disclose material information, including access to all information such as temperature charts, loading plan, logbooks, policy reports, survey reports, ISM records...etc. It must be said that the interpretation and accordingly the outcome of this proposition would depend on the *lex fori*.

⁹⁶ See Mankabady, S. ‘The Duty of Care for the Cargo’ [1974] E.T.L. 2, p.12. The author stated that the disproof of fault by the carrier is just one approach to proof allocation under the Hague Rules. He suggested that the rules should be redrafted to deal with the lack of clarity on the order of proof. Also cited in Ezeoke, C., ‘*Allocating onus of proof in sea cargo claims: the contest of conflicting principles*’, [2001] LMCLQ 261, at p.273. See also: UNCTAD, *The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention* (TD/BC.4/315/Rev.1) (United Nations New York 1991). where it was stated that Rules should be redrafted or modified in a way that it “*strikes a fairer balance between carriers and shippers in the allocation of risks, right and obligations with regard to liability...[and] shift the balance of liability slightly from the shipper to the carrier, but without radically changing the established liability system*”, para.1; Astle, W., *The Hamburg Rules - An appreciation of the cause and effect of the amendments to the Hague Rules and Hague-Visby Rules*, (Fairplay Publications, 1981), p.74.

3.2.4 Phase Four: The Carrier's Further Defence

If the claimant succeeds in rebutting the defence in Phase Three, the carrier might still be able to challenge the claimant's allegation by proving that the defect that caused the loss or damage emerged despite his exercise of due diligence pursuant to Article III, r.1.⁹⁷ In other words, once the claimant has proved that the vessel is unseaworthy, the carrier will not be able to rely on a particular exception unless he has proved that he exercised due diligence before and at the beginning of the voyage in order to make the vessel seaworthy.⁹⁸ One can ask, what would be the standard of proof imposed on the carrier to demonstrate that he exercised due diligence?⁹⁹ Must he demonstrate that he exercised due diligence in respect of all aspects of seaworthiness?

3.3 The Standard of Proving Due Diligence

The carrier will not be required to demonstrate all actions, precautions and supervision associated with all the requirements of exercising due diligence to provide a seaworthy and cargoworthy vessel before and at the beginning of the voyage. The process would be too long and severe.

⁹⁷ *The Polessk and Akademik Iosif Orbeli* [1996] 2 Lloyd's Rep. 40, p.45, per Clarke J.

⁹⁸ *The Polessk and Akademik Iosif Orbeli* [1996] 2 Lloyd's Rep. 40, where Clarke J expressed his provisional thoughts on the burden of proof as follows: "(1) *The burden is on the plaintiffs to prove: (a) that before and at the beginning of the voyage, the vessel was either unseaworthy or improperly equipped or supplied or that at the time the holds were unfit or unsafe for the reception, carriage and preservation of the cargo and (b) that the cargo was lost as a result. (2) If the plaintiffs prove (a) and (b), the defendants are liable unless they prove that the loss occurred notwithstanding the exercise of due diligence by themselves, their servants, agents or independent contractors.*" p.45.

⁹⁹ The standard of proof would again be on the balance of probabilities.

Under the current law, what follows from the requirement of causation is that the carrier is not required to prove that he had exercised due diligence in all aspects of seaworthiness (i.e. the exercise of due diligence in respect of the hull, machinery, equipment, cargo holds, supply and spare parts, etc.)¹⁰⁰ but merely in those aspects alleged by the cargo-claimant.¹⁰¹ In other words, the carrier is required to establish, on a balance of probabilities, both the fact of causal unseaworthiness and due diligence to provide a seaworthy vessel.

The exercise of due diligence depends on the facts of the case and the exception the carrier is relying on to escape liability, such as, perils of the seas (Article IV, r.2 (c)). This could make the burden on the carrier difficult to carry. If the cause of unseaworthiness cannot be determined, this failure would render most exceptions in Article IV, r.2 unavailable.¹⁰² However, the carrier, if he managed to prove that the damage would have occurred even if he had not exercised due diligence, may continue to rely on the exception.¹⁰³ In *The Yamatogowa*,¹⁰⁴ the cargo-interests attempted to reclaim their salvage and general average contributions due to a defect in the reduction gear which caused the vessel to breakdown. It was very difficult to inspect the gear

¹⁰⁰ All of the provisions (a) - (c) of Article III, r.1.

¹⁰¹ *The Heinz Horn* [1970] 1 Lloyd's Rep. 191 at p.198 (5 Cir.). It was said in this case that the position is different from the Harter Act where the carrier is not exonerated unless due diligence has been used to make the ship seaworthy in all aspects, regardless of causal connections. On the other hand, the exception under Article IV, r.2 of the Hague/Hague-Visby Rules exonerates the carrier unless his lack of due diligence proximately causes or contributes to the loss.

¹⁰² Schoenbaum, T., *Admiralty and Maritime Law* (St Paul, 2nd ed., 1994), p.567. "The duty to exercise due diligence is sometimes referred to as an "overriding obligation." This interpretation of art III.1 of the Hague-Visby Rules was mainly due to the pre-existing authorities on the warranty of seaworthiness implied by the common law to mitigate the effect of carriers' exceptions in the period before the adoption of the Hague Rules. (It was reinforced by the presence in the English statute of "subject to the provisions of Article IV" in art III.2 coupled with the absence of those words in art III.1.) Therefore, the exception of "fire, unless caused by the actual fault or privity of the carrier" in art IV.2(b) does not operate if the fire has been caused by the carrier's failure to exercise due diligence to make the ship seaworthy: *Maxine Footwear v Canadian Government Merchant Marine* [1959] AC 589; [1959] 2 Lloyd's Rep 105.

¹⁰³ See also Cooke J., *Voyage Charters*, (LLP, 3rd ed., 2007), para.85.107.

¹⁰⁴ *Kuo International v Daisy Shipping (The Yamatogowa)* [1990] 2 Lloyd's Rep. 39, per Clarke J.

because of the way in which it had been designed. During the annual inspection, the carrier had inspected the gear but only superficially. The carrier failed to exercise due diligence but still succeeded on the basis that a thorough inspection of the gear would still not have revealed the defect. The case is different where the loss or damage has occurred as a result of more than one cause (one of which is unseaworthiness) and each of the causes has contributed to the loss or damage.¹⁰⁵

3.4 Concurrent Causes

The obligation under Article III, r.1 has been construed as an 'overriding obligation',¹⁰⁶ and if the carrier has failed to fulfil this obligation, he cannot rely on a defence listed in Article IV, r.2. This was indicated in *Maxine Footwear Co. Ltd v Canadian Government Merchant Marine Ltd*.¹⁰⁷ However, where loss or

¹⁰⁵ *Smith, Hogg & Co. Ltd v Black Sea & Baltic General Insurance Co. Ltd* (1940) 67 Ll. L. Rep. 253, where Lord Wright stated that: "Unseaworthiness...can never be the sole cause of the loss. At least, I have not thought of a case where it can be the sole cause. It must, I think, always be one of several co-operating causes"; *Monarch SS Co. Ltd v Karlshamns Oljefabriker A/B* [1949] A.C. 196, p.227, per Lord Wright; "The unseaworthiness as a cause cannot from its very nature operate by itself."

¹⁰⁶ This expression was used by the Privy Council in *Paterson Steamship, Ltd v Canadian Co-operative Wheat Procedures Ltd. (The Sarnidoc)* (1934) 49 Ll. L. R. 421 where it was stated that "the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness", p.427, per Lord Wright. He added that "[i]f then goods were lost, say, by perils of the seas, there could still remain the inquiry whether or not the loss was also due to negligence or unseaworthiness. If it was, the bare exception did not avail the carrier," pp.426-427.

¹⁰⁷ *Maxine Footwear Co. Ltd v Canadian Government Merchant Marine Ltd* [1959] A.C. 589 (PC). A vessel loaded a cargo at Halifax and before the vessel commenced sailing, some scrubber pipe was negligently defrosted by using an acetylene torch, which ignited the insulation of the pipes and the fire spread to the rest of the vessel causing a total loss. The Judicial Committee of the Privy Council held that the obligation under Article III r.1 was an overriding obligation. Thus, the carrier was not entitled to rely on the exception list under Article IV r.2 as he failed to exercise due diligence. Somervell J. stated that: "Article III r.1 is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of Article IV cannot be relied on. This is the natural construction apart from the opening words of Article III r.2. The fact that that rule is made subject to the provisions of Article IV and rule 1 [Article IV, r.1] is not so conditioned makes the point clear beyond argument" at

damage occurs as a result of two causes (one of which being unseaworthiness), the carrier remains liable for the full extent of the damage unless he can show how much damage falls within the excepted peril on which he relies. This is clear from the ruling of Hobhouse J that “*It has long been held in construing exceptions clauses in contracts for the carriage of goods by sea, both at common law and in the context of the Hague and Hague-Visby Rules, that where the facts disclose that the loss was caused by the concurrent causative effects of an excepted and a non-excepted peril, the carrier remains liable. He only escapes liability to the extent that he can prove that the loss or damage was caused by the excepted peril alone.*”¹⁰⁸ So the carrier “*will not be allowed to invoke an exception to escape from liability for the damage caused by the non-fulfilment of Art. III, r.1.*”¹⁰⁹ It may be particularly difficult to prove the apportionment of each loss to each particular cause.¹¹⁰ This might be why there are very few cases where the carrier managed to determine the exact amount caused by the excepted peril. The position of the current law makes it arguably unjust for the carrier who must bear the entire loss caused concurrently by unseaworthiness and an excepted cause, even though the unseaworthiness

pp.602-603. See also, *The Farrandoc* [1967] 2 Lloyd’s Rep. 276; *Standard Oil Company of New York v Clan Line Steamers Ltd* [1924] A.C.100; *Smith, Hogg & Co. Ltd v Black Sea & Baltic General Insurance Co. Ltd* [1940] 67 Ll. L. Rep. 253, pp.259, 262, per Lord Wright.

¹⁰⁸ *Akt de Danske Sukkerfabrikker v Bajamar Compania Naviera S.A. (The Torenia)* [1983] 2 Lloyd’s Rep. 210, p.218, per Mr Justice Hobhouse.

¹⁰⁹ Margetson, N., *The System of Liability of Articles III and IV of the Hague-Visby Rules*, (Paris Legal Publishers, 2008), p.79; Asariotis, R., ‘Allocation of Liability and Burden of Proof in the Draft Instrument on Transport Law’, (2002) LMCLQ, 382-398, p.388. Cf. Cooke, J. et al., *Voyage Charters*, (LLP, 3rd ed., 2007), at para.85, p.259; Baughen S., *Shipping Law*, (Routledge Cavendish, 5th ed., 2012), p.113; Treitel, G. and Reynolds F., *Carver on Bills of Lading*, (Sweet & Maxwell, 3rd ed., 2011), para.9.244; Eder, B. et al., *Scrutton on Charterparties and Bills of Lading*, (Sweet & Maxwell, 22nd ed., 2011) at para. 11.030.

¹¹⁰ Asariotis, R., ‘Loss due to a combination of causes: burden of proof and commercial risk allocation’, cited as Chapter 6 in Thomas, R. (ed.), *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules*, (Lawtext, 2009), p.140; Frank Steven, ‘Apportionment of damage under the Rotterdam Rules’, (2011) 17 JIML, 343-359, p.344; Aikens, R., Lord, R. and Bools, M., *Bills of Lading*, (Informa, 2006), para.10, p.128.

was one of the causes of the loss or damage in a very small yet unknown percentage.

3.5 Suggested Solution on Concurrent Causes where one is unseaworthiness

The issue of concurrent causation and the amount of liability of damage for each party is not explicitly addressed in the Hague/Hague-Visby Rules but is left to national courts to apply their own domestic approach. As for the English court, the carrier, in order to exclude himself from liability for damage caused by the excluded peril, must prove the extent of damage that was caused by the excluded peril. A solution would be either to redraft the Hague/Hague-Visby Rules or adopt a new set of rules to deal with this aspect. As for the latter, the Rotterdam Rules are a relatively new set of rules and their adequacy in terms of properly addressing all of the above issues relating to the burden of proof should be assessed.

A possible solution could be for the court to exercise discretion in deciding the percentage of the damage caused by the excluded peril. It would be prudent to leave the decision to the national courts and let them define the percentages of the loss or damage between the different causes, according to the extent which each cause has contributed to the loss or damage and/or how much of the loss was attributed to the carrier's fault. It can also be suggested that the probability of unseaworthiness and its causes might play, to a certain extent, a role in affecting the discretion of the court to decide the percentage of fault that caused the loss or damage. The counter-argument to this suggestion is that this

approach might lead to non-harmonised decisions by national courts as each court would apply their own rules. This might lead to forum shopping by the parties. In this respect, it can be said that this point should be disregarded, the reason being that in respect of each international set of rules (not only liability conventions) national courts tend to interpret their provisions in a different manner.¹¹¹ Some national courts may not be bound by precedent and may even ignore the *travaux préparatoires*¹¹² that provide an indication of the advantages and disadvantages, as well as the underlying principles and reasons for the adopted international instrument.

3.6 Conclusions

The current English case law on the question of the burden of proof is undoubtedly problematic and lacks clarity. In particular, there are difficulties and ambiguities in relation to evidential issues concerning both the order of and the standard of the burden placed on the cargo-claimant to prove in the first place causative unseaworthiness. Moreover, additional difficulties concerning the burden of proof may arise in cases of multiple causes of loss.

With regard to the difficulties faced by the cargo-claimant in proving unseaworthiness, this Part of the Chapter suggests a number of solutions. One suggested solution is that the common law principle should no longer be applied. Instead, the carrier should first prove seaworthiness (in connection with the

¹¹¹ See Qais, M., *Achieving uniform interpretations of uniform rules: a case study of containerisation and carriage of goods by sea*, (PhD) thesis (Durham University, 2002) at p.148, cited in <http://etheses.dur.ac.uk/1248/>.

¹¹² Treitel, G. and Reynolds F., *Carver on Bills of Lading*, (Sweet & Maxwell, 3rd ed., 2011), where it is noted that “even if the *travaux préparatoires* are available to a tribunal, it may not feel bound by them whether clear or not” at para.10-001.

cause of the loss or damage) and failing that¹¹³ prove that he exercised due diligence. This approach is not new. Effectively, this is the bailment approach.¹¹⁴ There have been authorities¹¹⁵ calling for a change to the current approach. Arguably, the answer should be based on fairness and in this respect the suggested approach is demonstrably practical. The court can follow the approach of McHugh J in the Australia High Court¹¹⁶; as the Judge put it, the fact that the cargo reached its destination in a damaged condition or never arrived amounts to evidence of breach of the seaworthiness obligation and it is therefore incumbent on the carrier to prove the contrary. This, in some cases, it might be enough to impose a duty on the carrier to show first that his vessel departed in a seaworthy condition and if not, to show that he exercised due diligence in this respect.

Another solution is that relating to the court's readiness to infer the vessel's unseaworthiness. Courts often show sympathy regarding the difficulties faced by the cargo-claimant and can be prompted to infer the unseaworthiness of the vessel. This, however, is not a complete solution as the courts need to consider certain factors in order to determine whether such inference can and will be drawn. Each case will be determined on its particular set of facts and

¹¹³ i.e. the carrier must show the seaworthiness as opposed to the cargo-claimant showing unseaworthiness but if the carrier fails so that the vessel is found, in the first place, unseaworthy before and at the beginning of the voyage, then, as a second stage, the carrier should prove that, notwithstanding the vessel's unseaworthiness, he exercised due diligence in this respect.

¹¹⁴ This is also a common law concept but should not be confused with the common law principle (mentioned earlier) applied by courts in the absence of specific provision or guidance in the Hague/Hague Visby Rules in relation to the burden placed on the cargo-claimant to prove the vessel's unseaworthiness in the first place.

¹¹⁵ *The Torenia* [1983] 2 Lloyd's Rep. 210, p.216 and p.219, per Hobhouse J. Treitel, G. and Reynolds, F., *Carver on Bills of Lading* (Sweet & Maxwell, 3rd ed., 2011), para. 9.243

¹¹⁶ *Great China Metal Industries Co. Ltd v Malaysian International Shipping Corp Bhd (The Bunga Seroja)* (1998) 72 ALRJ 1592, p.1611, per McHugh J. In non-seaworthiness cases, see *Pendle & Rivett Ltd v Ellerman Lines Ltd* (1927) 29 Ll. L. Rep. 133, p.136, per MacKinnon J. (The carrier is virtually required to negative the fault on his part).

circumstances which may lack factors that would avail the court of the reasons to draw the inference. Thus, the 'inference approach' may be of a limited use.

The third solution relates to the willingness of the court to allow the cargo-claimant to simply rebut the exclusion relied upon by the carrier rather than proving, in the first place, the vessel's unseaworthiness. This approach provides an element of flexibility for the court to decide on each case.

The courts have recognised the difficulties faced by cargo-interests and, as shown by existing case law, in circumstances where it was considered unfair for the carrier to escape liability only on the basis of a technical procedural rule of law or the lack of a clear provision in the Hague/Hague-Visby Rules, they have expressed their sympathy to the claimants by following one or the other, or a combination of the three above approaches. This, however, does not mean that the issue should be left unaddressed.

Additionally, it would arguably be fairer if the carrier was not allowed to rely on any of the excluded perils/causes unless he had proved first that he exercised due diligence in respect of the matter in question. However, it is also arguable that fairness and practicality dictate that the defendant carrier should not be answerable for the entire damage if he adduced evidence that roughly gives an indication of the extent to which he was responsible for the damage. In this respect, therefore, the court should be allowed to exercise discretion in apportioning the loss between the contributing causes and the carrier should not be held answerable for the entire loss as long as some connection with the (or an) excepted peril can be demonstrated.

It is suggested that the apportionment of liability must be left open for the court to decide and not to be dealt with by the carrier or the cargo-claimant in terms of a rigid and pre-determined evidential rule on the burden of proof.

Do the Rotterdam Rules as drafted provide a solution? Part Two of this Chapter will attempt to answer this question.

Chapter Three

Part II – The Rotterdam Rules: The Carrier’s Rights and Immunities

3.7 Introduction

Unlike the Hague/Hague-Visby Rules, the Rotterdam Rules in Article 17 provide for a detailed system of liability of the carrier. Even so, it is still not yet clear if this new system of liability will provide solutions to existing problems under the current system. This section therefore intends to discuss in detail the provisions of Article 17 of the Rotterdam Rules and to assess the (arguably purported) solutions introduced by the Rotterdam Rules to the problems under the existing regime. Insofar as liability for unseaworthiness is concerned, the basic question addressed in this section is whether the Rotterdam Rules are an improvement of the current regime (the Hague/Hague-Visby Rules) or whether the problems persist. This will be done by examining Article 17(1)-(6) which covers the liability for all or part of the loss, damage or delay and relief from all or part of such liability. In addition, there will be a discussion regarding the changes in the list of exceptions under Article 17(3) and how these might have a bearing on the liability for unseaworthiness. This will include a discussion as to how the

possibility of apportionment of loss under the Rotterdam Rules may affect the apportionment of loss that is partially contributed to by unseaworthiness, the basis upon which such apportionment can be effected and the court's potential approach in this respect.

3.8 The Language of Article 17¹¹⁷

Article 17 provides as follows:

“1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in Chapter 4.

2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it is proved that the cause or one of the causes of the loss, damage or delay is not attributable to its fault or to the fault of any person referred to in Article 18.

3. The carrier is also relieved totally or partially of its liability pursuant to paragraph 1 of this article if alternatively there is proof regarding the absence of fault as provided in paragraph 2 of this article or more of the following events or circumstances caused or contributed to the loss, damage or delay:

(a) Act of God

(b) Perils, dangers, and accidents of the sea or other navigable waters

¹¹⁷ The word 'fault' is used in this Article, whereas in the English textbooks and case law, the word 'negligence' is used. In this Chapter, the word is used interchangeably and means the failure of the carrier to fulfil his duty of providing a seaworthy vessel.

- (c) *War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions*
- (d) *Quarantine restrictions; interference by or impediments created by governments, public authorities, rules, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in Article 18*
- (e) *Strikes, lockouts, stoppages, or restraints of labour*
- (f) *Fire on the ship*
- (g) *Latent defects not discoverable by due diligence*
- (h) *Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or documentary shipper is liable pursuant to Articles 33 or 34*
- (i) *Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with Article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee*
- (j) *Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods*
- (k) *Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier*
- (l) *Saving or attempting to save life at sea*
- (m) *Reasonable measures to save or attempt to save property at sea*
- (n) *Reasonable measures to avoid or attempt to avoid damage to the environment, or*

(o) *Acts of the carrier in pursuant of the powers conferred by Articles 15 and 16.*

4. *Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage or delay.*

5. *The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:*

(a) *The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by, (i) the unseaworthiness of the ship, (ii) the improper crewing, equipping, and supplying of the ship or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods and*

(b) *The carrier is unable to prove that either (i) none of the events or circumstances referred to in subparagraph 5(a) of this article caused the loss, damage, or delay or (ii) it complied with its obligation to exercise due diligence pursuant to Article 14.*

6. *When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstances for which it is liable pursuant to this article.”*

The first comment is that Article 17(5) expressly provides detailed rules with regard to the burden and order of proof in general. This is lacking from the equivalent provisions in the Hague/Hague-Visby Rules. It can arguably be said

that this is at least a *prima facie* improvement. However, before seeing whether the codification of this general system of liability developed under the Rotterdam Rules is an overall improvement compared to the Hague/Hague-Visby Rules, it is necessary to discuss the changes introduced by Article 17. For example, the nautical fault exception¹¹⁸ is removed, and the doctrine of seaworthiness as an overriding obligation does not exist in this article. The latter can be understood from the language used in the article for it recognises: (a) the 'partial liability of the carrier' (or 'liability for only part of a loss' / 'all or part') and (b) a combination of causes for a loss ('cause or causes' / 'caused or contributed'). A detailed discussion regarding changes in the carrier's rights and immunities will follow after discussion of the allocation of the burden of proof.¹¹⁹

3.9 Allocation of the Burden of Proof by Article 17 of the Rotterdam Rules

This lengthy Article expressly systemises and allocates the burden of proof between cargo-interests and carrier. It is obvious that the language differs, both in structure and working,¹²⁰ from that in the current regime. However, there must be a close examination of the issue in order to ascertain whether this actually makes any difference to the approach existing under the Hague/Hague-

¹¹⁸ There is no nautical fault exclusion in the Rotterdam Rules similar to the one under Article IV, r.2(a) of the Hague/Hague-Visby Rules.

¹¹⁹ Note the express restriction to cargo claims in the introductory wording of Article 17.1. This, together with the title of the provision (*Basis of liability*) and of Chapter 5 (*Liability of the carrier for loss, damage or delay*) suggests that Article 17 is not applicable in the context of a claim by the carrier against cargo interests, such as for loss due to dangerous cargo.

¹²⁰ It was said that the language of Article 17 appears to differ from the Hague/Hague-Visby Rules in structure, language and substance. See Asariotis, R., 'Loss due to a combination of causes: burden of proof and commercial risk allocation' cited as Chapter 6 of Thomas, R. (ed.), *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules: An analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Lawtext Publishing Limited, 2009), p.146.

Visby Rules and whether, and if so to what extent, this language would improve the position of the parties.

3.9.1 Phase One: Article 17(1) – The Claimant’s *Prima Facie* Case

Article 17(1) recognises the basic rule that sets in motion every liability process.

This can basically be described as the claimant showing that he has suffered a loss (loss/damage/delay) and that the relevant event occurred during the period of the carrier’s responsibility.¹²¹ The presumption of liability of the carrier can be inferred by providing (a) a clean bill of lading¹²² and (b) notice of loss, restricting the time period during which the damage could have occurred.¹²³ This *prima facie* case is consistent with industry practice established under English law.¹²⁴

The *prima facie* case is only the beginning. The carrier is liable if no persuasive evidence is put forward by the carrier to rebut the claimant’s *prima facie* case.

However, the subsequent paragraph of Article 17 provides the carrier with some tools to escape some or all of the presumptive liability. Whilst, in terms of

¹²¹ This is the same as under the current law: e.g. see *Aktieselskabet de Danske Sukkerfabriker v Bajamar Compania Naviera SA (The Torenia)* [1983] 2 Lloyd’s Rep.210, where it was stated that “[t]he legal burden of proof arises from the principle: He who alleges must prove”, p.215, per Hobhouse, J.

¹²² Stating that the goods were shipped clean on-board, in apparent good order and condition. The clean bill of lading is only *prima facie* proof of the delivery of the goods in good order and condition but, once the bill of lading has been transferred to the hands of the endorsee/receiver, the evidentiary value of the bill is strengthened as this will not allow the contrary submission against a third-party cargo claimant acting in good faith. This principle of the value of the bill of lading is now confirmed in Article 41 given to negotiable transport documents and other forms of contract particulars (see Article 41(b) (ii) and (c)).

¹²³ See Article 23(1) explaining that the carrier is presumed to deliver the goods according to the contract description unless notice of loss was given to the carrier before or at the time of delivery.

¹²⁴ This is when the goods listed in the bill of lading were entrusted to the carrier in a good order and condition but they were damaged or did not arrive at all, see e.g. *The Amstelslot* [1962] 1 Lloyd’s Rep. 539, at p.545, per McNair J; *Albacora v Westcott & Laurance* [1966] 2 Lloyd’s Rep.53; this is also the law in US, see e.g. *Brown & Williamson v SS Anghyra* (1957) 157 Fed. Supp.737.

proving damage, this may not be of particular importance to general or bulk cargoes, the use of containers may cause considerable evidential problems to cargo-claimants in proving that the goods inside the container were damaged during the custody of the carrier.¹²⁵ This inevitably raises the question as to whether the codification of this *prima facie* evidential rule makes the claimant's case easier to prove as compared to the current position.

- The potential advantage/ disadvantage in codifying the claimant's prima facie evidence

a) The inference raised from the prima facie loss of, or damage to, the cargo that occurred outside the period of responsibility/carriage of the container by the sea carrier

In some cases, the loss of or damage to containerised cargo may have occurred outside the period of the sea carrier's responsibility. The typical example is of cargo missing from inside a sealed container at its final destination or the cargo inside a sealed container found to be damaged by fresh water rather than seawater due to the unfitness of the container. This might be an indication that the sea carrier cannot be responsible (provided that he was not responsible for the arrangement of the land carriage) for loss of or damage to the cargo, particularly when the container arrived at the loading and discharge port sealed and without signs of any external tampering.¹²⁶ In Article 17(1) the term '*the event or circumstance*' imports an alternative way to adduce 'prima facie evidence'. This may solve the difficulties faced by the sea carrier in

¹²⁵ See Baughen, S., *Shipping Law*, (Cavendish Publisher, 5th ed., 2012), p.14.

¹²⁶ It was held in *Lutfy Ltd v C.P.R. Co.* [1973] 1 Lloyd's Rep. 1066, that the fact that the rail carrier did not inspect the top part of the container before giving a clean receipt to the ocean carrier prevented the land carrier (who might be the cargo-owner) from proving that the container had been received in a damaged condition.

proving that the actual loss or damage caused inside a sealed container occurred outside his period of responsibility, as the ‘event or circumstance’ which caused the loss or damage occurred during that other period, i.e. inland carriage. ‘Prima facie evidence’ here is meant to be such evidence which, at face value alone, is capable of rebutting the cargo-claimant’s *prima facie* case. Thus, the sea carrier could easily overcome the difficulty of rebutting the cargo-claimant’s *prima facie* case as the court could easily draw the inference that the sea carrier cannot be responsible for damage that occurred inside the sealed container. However, it is otherwise submitted that, as regards the loss of or damage to the goods, the Rotterdam Rules would make no difference to the *prima facie* rule compared to the current regime.¹²⁷

b) The inference raised from the prima facie delay occurred during the sea carriage

Loss or damage caused by delay (due to unseaworthiness) may raise a different issue. Conceptually, it is often difficult to determine precisely when a ‘delay’ occurs but it may not be impossible to discover the ‘event or circumstance’ that caused the delay, which, for instance, may relate totally to a delay of the vessel while at sea.¹²⁸ Thus, it is submitted that as regards delay in

¹²⁷ Another point is that under the law of some jurisdictions, the evidential problems linked with the carriage of containers can often be solved by proving that the container was apparently in good order and condition when received by the carrier but arrived damaged and, by proving so, there will be a strong presumption that the loss or damage to the contents of the container is attributable to its damage for which the carrier should be held liable; see, for instance, *Matsushita v S.S. Aegis Spirit* 414 F. Supp. 894 (W.D. Wash, 1976).

¹²⁸ von Ziegler, A., ‘Liability of the Carrier for Loss, Damage or Delay’ cited as Chapter 5 of von Ziegler, A., *The Rotterdam Rules 2008: Commentary to the United Nations Conventions on Contracts for the International Carriage of Goods (Wholly or Partly) by Sea*, (Wolters Kluwer, 2010). It was stated that: “it may suffice for claimants to prove the factual prerequisite of a *prima facie* delay”, at p.99; Sturley, M., *The Rotterdam Rules: The UN Convention on Contracts for the*

sea carriage, the reference to ‘*event or circumstance*’ may assist a cargo-claimant to establish his *prima facie* case by demonstrating that the relevant event or circumstance occurred during the period of the carrier’s responsibility without regard to the timing of the actual loss, damage or delay.¹²⁹

3.9.2 Phase Two: Article 17(2) or (3)

Article 17(2) and (3) provide two different routes for the carrier to relieve himself of responsibility if he proves either (a) that the cause of the damage (or part of it) was not his fault or the fault of those for whom he is responsible (Article 17(2)); or, (b) that the damage was caused (fully or partially) by one of the enumerated exceptions contained in Article 17(3).

It is a known fact that the exemption under Article IV, r.2(q)¹³⁰ was added to the Hague/Hague-Visby Rules particularly because delegates from civil law countries requested it. They did so because lawyers from civil law countries were not familiar with listing and enumerating different reasons for exoneration of liability.¹³¹ They were used to a system where all of what is included in the list is covered under a general test of the carrier. The use of the catch all or general exclusion provision might be more beneficial to civil law countries and is not dissimilar in principle (though dissimilar in construction) to the relevant

International Carriage of Goods Wholly or Partly by Sea, (Thomson Reuters Legal Limited, 2010), p.99.

¹²⁹ Sturley, M., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters Legal Limited, 2010), p.99.

¹³⁰ Article IV, r.2(q) reads: “Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier.” It was laid down by *Hourani v Harrison* (1927) 32 Com. Cas. 305; [1927] 28 Ll. L. Rep. 120, that the second ‘or’ in the text is said to be an error and should read as ‘and’. This means that the carrier is not merely required to prove the absence of his own fault or privity, but the absence of the fault or negligence is also required. See Margetson, N., *The system of liability of Articles III and IV of the Hague [Visby] Rules*, (Paris Legal Publishers, 2008), p.164.

¹³¹ This was in the course of the seventh plenary session of the Diplomatic Conference, held on 25 October 1920. See CMI (eds.), *The travaux préparatoires of the Hague Rules and of the Hague-Visby Rules* (Antwerp, 1997), pp.371-390.

provisions of the Hamburg Rules and CMR.¹³² This approach is not favourable for a carrier under the English system.¹³³ However, for jurisdictions where the court has taken the approach that ‘[i]t is reasonable to place this burden upon a carrier because he undertook to carry the goods and he has, or ought to have, at his disposal almost all of the relevant information available’,¹³⁴ a carrier’s exoneration from liability is only allowed where he can prove that he has operated with due diligence and that the damage has not resulted from his fault.¹³⁵ Article IV, r.2(q) is thus an additional alternative approach in the liability regime of the Hague/Hague-Visby Rules which is essentially replicated in Article 17(2) of the Rotterdam Rules.¹³⁶ The obvious effect of Article 17(2) is to encourage States to unify their liability system with other inland transportation regimes should the contract of carriage be door-to-door.¹³⁷ This approach, based on Article IV, r.2(q) was acknowledged in the Rotterdam Rules in Article

¹³² See para. 3.11.1.1, at p.262, where it is demonstrated that the carrier need only show one of the causes is not attributed to its fault.

¹³³ See below why it is not a favourite defence amongst carriers, probably because a heavy burden lays on the carrier to be discharged; the carrier has to prove the lack of fault on his part, or the fault or neglect on the part of his servants. Also, the other provisions in Article IV, r.2(a)-(p) are so wide that it is only on the rarest occasion that the carrier has not been adequately accommodated. Further, the *ejusdem generis* rule could not apply to (a)-(p) exceptions. This was the approach taken by Finlay J in *Potts & Co v Union S.S. Co of New Zealand* [1946] N.Z.L.R. 276, at p.286.

¹³⁴ As the Second Circuit declared in *Encyclopaedia Britannica Inc. v S.S. Hong Kong Producer* [1969] 2 Lloyd’s Rep.536, at p.543 (2 Cir. 1969) (US case) “It is almost impossible for the shipper to prove that the carrier was negligent or lacked due diligence because as a practical matter all evidence on those issues is in the carrier’s hands.” This approach is contrary to what is explained in Part I regarding the Hague/Hague-Visby Rules.

¹³⁵ See *Hourani v Harrison* (1927) 28 Ll. L. Rep.120, where Bankes LJ stated that: “[s]o far as the burden of proof is concerned, it is plain that the obligation is laid upon the person seeking the benefit of the exception to establish not only that the loss has been without his actual fault or privity, but also that it has been without the fault or neglect of his agents or servants,” at p.124 (C.A.).

¹³⁶ Article 17(3) reads that: “[t]he carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault...” (emphasis added). This point was suggested in the CMI Yearbook 2000 - Singapore I, at p.131, para.5.1.2.

¹³⁷ The terms of reference of the International Sub-Committee on Issues of Transport Law approved by the CMI Executive Council at its meeting of 11 November 1999 (CMI Yearbook 1999, at p.117) were the following: “to consider in what area of transport law, not at present governed by international liability regimes, greater international uniformity may be achieved; to prepare the outline of an instrument designed to bring about uniformity of transport law.”

17(2)¹³⁸ but separated from other exclusion clauses contained in Article 17(3). This separation is important to the civil law countries in a way that the entire exclusion list which can be of no use to the civil law countries is now covered under one general provision. Both provisions are examined below.

3.9.2.1 One Approach: Article 17(2) – The Carrier’s Burden to Prove Absence of Fault

Once the cargo-claimant has established its *prima facie* case, the burden is on the defendant carrier to establish why he should not be liable – wholly or partially – for the loss, damage or delay. The carrier will be exonerated if he manages to show that *‘the cause or one of the causes of the loss, damage or delay is not attributable to its fault or to the fault of any person referred to in Article 18.’*¹³⁹ This may arguably look identical to what the carrier would seek to establish by relying on Article IV, r.2(q) of the Hague/Hague-Visby Rules at Phase Two.¹⁴⁰ However, it in fact differs in that it seems easier for the carrier to satisfy this burden of proof as compared to the equivalent burden under Article IV, r.2(q) of the Hague/Hague-Visby Rules.¹⁴¹ The carrier may be unable to

¹³⁸ Article 17.2 provides *“the carrier is relieved of all or part of its liability...it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person for whom the carrier is responsible.”*

¹³⁹ Article 17(2), Rotterdam Rules.

¹⁴⁰ Since there is no genus that would embrace all other causes not covered by the rules from (a)-(p) of Article IV, r.2, it is generally accepted that it is not required to read into the words *‘any other cause’* such as those covered from (a)-(p), and that the words must be given a wide interpretation as to provide the carrier with immunity in respect of all cases of cargo loss or damage where this has arisen without any neglect or fault on the part of the carrier or his agent or servants, as held in *Potts v Union S.S. Co. of New Zealand* [1946] N.Z.L.R. 276 (New Zealand).

¹⁴¹ Sturley, M., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters Legal Limited, 2010). It was stated that: *“a carrier cannot rely on article 4(2)(q) of the Hague and Hague-Visby Rules unless it can show that its fault (and the fault of those for which it is responsible) did not even contribute to the loss or damage”*, at p.103; von Ziegler, A., ‘Liability of the Carrier for Loss, Damage or Delay’ cited as Chapter 5 of von Ziegler, A., *The Rotterdam Rules 2008: Commentary to the*

escape liability on the basis of Article IV, r.2(q) because he must show that such loss or damage arose solely from the excepted peril and that there was no other (non-exempted) cause or contribution by any fault or privity of the carrier.¹⁴² Additionally, the carrier has to prove that the loss or damage occurred without the fault or neglect of the agent or servants of the carrier.¹⁴³ Therefore, under the Hague/Hague-Visby Rules this general exception was of limited use if not, as far as the English approach is concerned, effectively redundant due to the above difficulties. This is because the carrier cannot rely on any exception clause without satisfying first the overriding obligation of exercising due diligence to make the vessel seaworthy.¹⁴⁴ Under the Rotterdam Rules, however, there is no such condition; the carrier might escape part of the liability by showing that part of the loss, damage, or delay *'is not attributed to its fault or to the fault of his servant'*.¹⁴⁵

- The liability of the carrier attributed to his agent's negligence

One could logically suggest that a reading of Article 17(2) together with Article 18¹⁴⁶ would afford the carrier with at least a partial exclusion of liability that is

United Nations Conventions on Contracts for the International Carriage of Goods (Wholly or Partly) by Sea, (Wolters Kluwer, 2010). It was stated that: "it may suffice for claimants to prove the factual prerequisite of a *prima facie* delay," at p.99; Sturley, M., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters Legal Limited, 2010). It was stated that: "Article 17(2) indicates that it is easier for the carrier to meet this burden of proof than the equivalent burden under the (q) clause of the Hague-Visby Rules," p.103.

¹⁴² The slightest 'contribution to the loss or damage' by the carrier would render the exclusion in (q) inapplicable.

¹⁴³ Article IV, r.2(q), Hague/Hague-Visby Rules.

¹⁴⁴ See para. 2.16.2, at p.145 and para. 3.4, at p.195.

¹⁴⁵ Article 17(2), Rotterdam Rules.

¹⁴⁶ "The carrier is liable for the breach of its obligation under this Convention caused by the acts or omissions of:

- (a) Any performing party;
- (b) The master or crew of the ship;
- (c) Employees of the carrier or a performing party; or

not available under Article IV, r.2(q) of the Hague/Hague-Visby Rules; where the loss or damage is partially attributed to an act or omission of the carrier, it follows that the carrier will only be partially responsible for such loss or damage even if it resulted from the negligence of the carrier's servant (maritime party). In other words, under the Hague/Hague-Visby Rules, in practice, a carrier wishing to rely upon this exception must prove not only that the loss or damage claimed did not arise from his own actual fault or privity¹⁴⁷ but also that it did not arise from the fault or negligence of his servants, agents or independent contractors. In this respect, a distinction must be made between the act of the carrier's agent that caused unseaworthiness when acting outside the scope of his employment and the act of the agent when performing the task delegated by the carrier.

In *The Chyebassa*,¹⁴⁸ a cargo of tea was loaded on board the vessel in Calcutta. The vessel was seaworthy at that time. She subsequently called at Sudan, an intermediate port, where she discharged part of the cargo and loaded some other cargo. Whilst in the port, a stevedore employed by the shipowner stole a brass storm valve cover plate. When the vessel later encountered heavy weather, seawater gained access to the hold therefore damaging the cargo. The shipowner relied upon a number of exceptions under Article IV, r.2, one of which was (q), and managed to prove that he had taken reasonable care as regards the policing of the stevedores whilst they were working in the vessel's

(d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control."

¹⁴⁷ See Baughen, S., *Shipping Law*, (Routledge Cavendish, 2010), at p.129-130.

¹⁴⁸ *Leesh River Tea Co. v British India Steam Navigation Co. (The Chyebassa)* [1966] 2 Lloyd's Rep. 193.

holds.¹⁴⁹ The Court of Appeal, stated that the stealing of the cover was in no way incidental to the delegated task of unloading/loading the cargo, and that the stevedores were not therefore the carrier's "servant or agent".¹⁵⁰ The Court held that the act of the stevedore that interfered with the vessel and rendered her unseaworthy was to be regarded as an act of a stranger and, as a result, the shipowner was entitled to rely on the exception under Article IV, r.2(q). As long as the employee's or agent's act (i.e. stealing) is outside the scope of the task delegated to him, it is considered to be an act of a stranger and not an act of the shipowner's employee or agent.¹⁵¹ In other words, although an employee or agent is considered to be an agent of the carrier for the purposes of unloading/loading cargo, he will not be so for the purposes of the above exception if his act causing the loss or damage was not within the scope of this task.¹⁵²

It is unlikely that *The Chyebassa* would be decided in the same way today. The problem in *The Chyebassa* was that the obligation of exercising due diligence under the Hague/Hague-Visby regimes did not cover the entire voyage and thus did not make the shipowner liable for unseaworthiness at an intermediate port. The Rotterdam Rules now, under the continued obligation to exercise due

¹⁴⁹ *Leesh River Tea Co. v British India Steam Navigation Co. (The Chyebassa)* [1966] 2 Lloyd's Rep. 193, at p.200, per Sellers LJ.

¹⁵⁰ Article IV, r.2(q) of the Hague/Hague-Visby Rules states: "Any other cause arising without the actual fault or privity of the carrier, or without the actual fault or neglect of the agent or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servant of the carrier contributed to the loss or damage."

¹⁵¹ *Leesh River Tea Co. v British India Steam Navigation Co. (The Chyebassa)* [1966] 2 Lloyd's Rep. 193, at p.200, per Sellers LJ.

¹⁵² *Leesh River Tea Co. v British India Steam Navigation Co. (The Chyebassa)* [1966] 2 Lloyd's Rep. 193, at p.200, per Sellers LJ, also per Danckwerts LJ, at p.201. See also, *RF Brown & Co. Ltd v T & J Harrison* (1927) 43 TLR 633. As a rule, the stevedores appointed to load or discharge a vessel are independent contractors (and not infrequently imposed by local unions under monopolistic regimes with not much room, if any, for negotiation or selection by the shipowner). However, they are regarded as servants of the shipowner for the purposes of sub-clause (q).

diligence to provide a seaworthy vessel, would reverse the ruling of *The Chyebassa* and render the carrier liable for the action of the stevedores under Article 18. Article 18 provides that the carrier will be liable (either wholly or partially) for loss or damage¹⁵³ ‘*caused by the acts or omissions of: (a) any performing party; (b) The master or crew of the ship; (c) Employees of the carrier or performing party; or (d) any other person that performs or undertakes to perform any of the carrier’s obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.*’¹⁵⁴ The Article can only be interpreted as holding the carrier (partially or fully) liable for any act of a performing party or their employee which caused the vessel to be unseaworthy even if such an act is outside the scope of the contract of carriage or the contract of the third party’s employment.¹⁵⁵ It appears that if and when the Rotterdam Rules do come into force, Article 18 will be one of the first provisions which would need to be tested

¹⁵³ The exact phraseology of the opening sentence of Article 18 is that the carrier will be liable “....for the breach of its obligation under this Convention caused by....” a certain act or omission. This can be read only to mean loss or damage (or delay) caused by the act or omission. The literal reading of the provision may appear circular. There must be a breach of an obligation caused by an act or omission of a certain person (agent) but when that act or omission does not cause a breach (but causes loss or damage) is such an act or omission an act and omission in isolation? The phraseology seems to equate ‘breach’ with ‘loss or damage’. If there can be no ‘loss or damage’ without ‘breach’ then is the liability for any act or omission of such person essentially strict? Alternatively, is this provision saved by the combined reading of Article 17(2) which refers to ‘*fault of any person referred to in article 18?*’ (emphasis added).

¹⁵⁴ The words ‘*acts or omissions*’ of an employee/agent used in Article 18 of the Rotterdam Rules do not have the same meaning with the words ‘*fault or neglect*’ used in Article IV, r. 2(q) of the Hague/ Hague-Visby Rules. It is clear that Article 18 cannot stand alone and that such ‘*acts or omissions*’ can be understood only as the ‘*faults*’ referred to in Article 17(2). Otherwise, the carrier will arguably be strictly liable for the ‘*acts or omissions*’ of any of the persons referred to in Article 18.

¹⁵⁵ Sturley, M., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters Legal Limited, 2010), pp.144.-145. The authors have given the following example: a carrier contracts with a stevedoring company to unload highly flammable cargo. During unloading, the company’s photographer, who is on-board to take pictures for the company’s website, accidentally drops a hot photo lamp into the hold. The ensuing fire destroys the cargo. The company is a performing party, but the photographer did not perform or undertake to perform any of the carrier’s obligations under the relevant contract of carriage. The carrier is still vicariously liable for the photographer’s act or omissions under Article 18(c) because the photographer is an employee of a performing party.

before a court. Arguably, if *The Chyebassa* is read in light of Article 18, it would provide that a stevedore was simply one of the ‘employees of the carrier or a performing¹⁵⁶ party’ and thus the carrier is liable for the stevedore’s acts. Consequently, the test that emerged in *The Chyebassa* is not applicable under the Rotterdam Rules. The carrier will also be liable for an act of the stevedores even if it was outside the scope of their delegated work.¹⁵⁷ Performing parties, subject of Article 19,¹⁵⁸ would be considered as ‘maritime performing parties’¹⁵⁹ who are subject to the obligation and liabilities imposed on the carrier under the

¹⁵⁶ Pursuant to Article 1(6) of the Rotterdam Rules; (a) ‘Performing party’ means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.

(b) ‘Performing party’ does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.’

¹⁵⁷ Unlike the approach that the court follows where the case is one falling within the scope of the Hague/Hague-Visby Rules, i.e. *Leesh River Tea Co. v British India Steam Navigation Co. (The Chyebassa)* [1966] 2 Lloyd’s Rep. 193. The court made it abundantly clear that in the interpretation of the effect of Article IV, r.2, stevedores, ship-repairers and others must be regarded as agents or servants of the carrier, and any neglect or failing on their part causing cargo loss or damage must be regarded as a fault or failure on the part of the carrier, his agents or servants. (See <http://www.bing.com/news/search?qSamantha+Mumba+is+engaged&FORM=MSNTM3&mkt=en-gb&ocid=today>).

¹⁵⁸ Article 19 states that: “1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier’s defences and limits of liability as provided for in this Convention if: (a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and (b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier’s obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.”

¹⁵⁹ A ‘maritime performing party’ means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.”

Rotterdam Rules. If the provisions of Article 19 apply to the performing parties, they will be regarded as maritime performing parties. The carrier might in this case be encouraged to seek compensation for the damage that was caused by the act of the maritime performing party. It is important to note that the stevedores in *The Chyebassa* would not be considered maritime performing parties in light of the Rotterdam Rules, as the actions of the stevedores did not fall within the scope of their employment nor within any of the carrier's obligations, e.g. cargo operations. Under the Hague/Hague-Visby Rules, if the carrier's servants are even partially at fault, the carrier cannot rely on Article IV, r.2(q).

3.9.2.2 An Alternative Approach: Article 17(3) - The Specific Exceptions under the Catalogue of Defences

a) The Language of Article 17(3)

Article 17(2), which is similar to Article IV, r.2(q) of the Hague/Hague-Visby Rules, is very wide and is indeed included in the list of exemptions. It should not be understood as a supplement to the list of exemptions enumerated in Article 17(3). The latter article is an alternative means of liability exemption in the system of liability provided for by the Rotterdam Rules.¹⁶⁰ The obvious interpretation of the opening sentence of Article 17(2), which provides that '*the carrier is relieved of all or part of its liability*', together with the opening sentence of Article 17(3), which provides that '*the carrier is also relieved...if, alternatively, to proving the absence of fault as provided in paragraph 2 of this article...*' is

¹⁶⁰ von Ziegler, A., 'Liability of the Carrier for Loss, Damage or Delay' cited as Chapter 5 of von Ziegler, A., *The Rotterdam Rules 2008: Commentary to the United Nations Conventions on Contracts for the International Carriage of Goods (Wholly or Partly) by Sea*, (Wolters Kluwer, 2010), p.101.

that both Articles 17(2) and (3) stand side by side as alternatives to each other. This means that Article 17(2) should not be given a wider interpretation and exempt the carrier from liability for all perils, even those included under Article 17(3) where neither he nor his employees or agents were at fault.¹⁶¹ The use of Article 17(2), with the words '*any other cause*' now omitted, can only be an alternative to Article 17(3) when the cause of loss or damage is not included in the exclusions listed under Article 17(3).

The above differs from Article IV, r.2(q) of the Hague/Hague-Visby Rules, where the opening words '*any other cause*' of paragraph (q) naturally lends itself to being interpreted as an *ejusdem generis* exception to those listed in paragraphs (a) to (p) of Article IV, r.2. Arguably, this could lead to interpretational difficulties as any interpretation of Article IV, r.2(q) should only include exceptions of the same genus.¹⁶² Such a problem should not exist anymore under the scheme of Articles 17(2) and (3) of the Rotterdam Rules as the requirement to invoke Article 17(2) differs from Article 17(3). Under Article 17(2), "*the carrier must prove the absence of fault (which will generally require the carrier to prove the cause). It must prove not only its own absence of fault but also the absence of fault on the part of anyone for whom it is responsible under Article 18...under Article 17(3), in contrast, the carrier must prove the cause of the loss...*"¹⁶³

¹⁶¹ See *Potts v Union S.S. Co. of New Zealand* [1946] N.Z.L.R. 276. Cf. *Paterson Steamships v Canadian Co-operative Wheat Producers* [1934] A.C. 538, at pp.549-550. Also, see Astle, W., *Shipping and the Law* (Fairplay Publication, 1997), pp.178-179.

¹⁶² Eder, B., *Scrutton on Charterparties and Bills of Lading*, (Sweet & Maxwell, 22nd ed., 2011), p.438, para.20-082.

¹⁶³ Sturley M. et al., *The Rotterdam Rules - The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters, 2010), p.104.

b) The Exclusion List

The list of exclusions in Article 17(3) is not identical to the traditional catalogue under Article IV, r.2 of the Hague/Hague-Visby Rules, which has been the carrier's principal recourse to defend himself in most cargo claims. This inevitably raises the question as to whether the changes in the new list will affect the liability for unseaworthiness and as to whether such changes were necessary to strike a fair balance between the respective interests of cargo and carrier.

As outlined above, most of the exceptions in the Hague/Hague-Visby Rules have been maintained or incorporated in the catalogue of exceptions in the Rotterdam Rules. It is not the intention of this thesis to deal with each and every one of those exceptions. This section is intended to concentrate only on the changes that may be relevant to the carrier's potential liability for unseaworthiness.

c) Deletion of the 'Error in Navigation' Exception

The most obvious difference in the new list of exceptions is the deletion of the first from those included in Article IV, r.2 of the Hague/Hague-Visby Rules.¹⁶⁴ This was heavily debated and eliminated under the Hamburg Rules¹⁶⁵ and under the UNCITRAL negotiations, as it was a primary goal for many delegates and industry observers.¹⁶⁶ It dates back to clauses under bills of lading in the

¹⁶⁴ Sturley M. et al., *The Rotterdam Rules - The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters, 2010), p.105.

¹⁶⁵ It was criticised and eliminated under the Hamburg Rules; see Herber, R., *The Hamburg Rules: A Choice for the E.E.C.?* at pp.17 and 41. See also Sturley M. et al., *The Rotterdam Rules - The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters, 2010), p.105.

¹⁶⁶ See, e.g. 10th Session Report, para.35.

nineteenth century.¹⁶⁷ The master's and/or crew's '*error in navigation*' exclusion has been described as the carrier's major defence.¹⁶⁸ Naturally, this raises the question as to what motivated the deletion of such an important defence for the carrier from the exclusion list.

There have been several arguments in support of adding or incorporating this exception into a bill of lading. The major one, at the time when the Harter Act and the Hague/Hague-Visby Rules were adopted, was the lack of control by the carrier himself after the vessel cast off from the berth and commenced her voyage. In other words, the carrier's lack of means of communication with his vessel whilst at sea and the fact that the masters had to act on their own judgment were the underlying reasons for this argument.¹⁶⁹ Among the traditional rationales favouring this exclusion was the perception that the vessel herself constituted an adequate incentive for the carrier to take due care when appointing a competent master and crew. A more noteworthy rationale, however, is that this exclusion emerged as a commercial statutory compromise in an era when the carrier was attempting to contract out of every kind of liability.¹⁷⁰

¹⁶⁷ It was included in the Harter Act in 1893. See, Sturley M. et al., *The Rotterdam Rules - The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters, 2010), p.105. See *The Glenochil* [1896], p.10 and *Foreman and Ellams v Federal Steam Navigation Co.* [1928] 2 K.B. 424.

¹⁶⁸ Treitel, G. and Reynolds, F., *Carver on Bills of Lading*, (Sweet & Maxwell, 3rd ed., 2011), para.9.210. It was described as the '*shipowners clause*' by Sir Norman Hill at the Hague Conference on 31 August 1921; see Sturley M., *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, (F. B. Rothman & Co, Littleton 1990), Vol.1, p.248. It was described as '*...one commonly accepted exemption in maritime contracts which would cause most surprise to the man on the Clapham omnibus...*'; Aikens, R., Lord, R. and Bools, M., *Bills of Lading*, (Informa, 2006), para.10.201.

¹⁶⁹ See e.g. *The Lady Gwendolyn* [1965] P 294, p.330 (Sellers LJ).

¹⁷⁰ *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd* [1929] A.C.223, at p.236, per Lord Sumner, '[t]he intention of this legislation in dealing with the liability of a shipowner as a carrier of goods by sea undoubtedly was to replace a conventional contract, in which it was constantly attempted, often with much success, to relieve the carrier from every kind of liability, by a legislative bargain, under which he should be permitted to limit his obligation to take good

In view of technological advances¹⁷¹ over the past 90 years and of the more demanding safety and operational standards with which the carrier is required to comply, the emerging question is whether it would now be satisfactory for the carrier to escape liability by pleading '*act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation.*' The answer to this question would also indicate the answer to be given to the question as to whether it would be a sound policy that the navigational fault defence is removed from the list of exceptions in the Rotterdam Rules and whether the changes in the exclusion list from the current system is necessary to strike a fair balance between the interests of carrier and cargo.

- The Principle of Allocation of Risks

The deletion of the navigational error exclusion would encourage the carrier to take precautions¹⁷² by exercising due diligence to provide a seaworthy vessel and container as long as such precautions do not exceed the cost of any loss or diminution in the value of the goods in transit.¹⁷³ These precautions would be

care of the cargo by an exception, among others, relating to navigation and management of the ship. Obviously, his position was to be one of restricted exemption."

¹⁷¹ See, in this respect, the argument advanced in Chapter Four dealing with the effect of shipping industry standards on the standard of seaworthiness.

¹⁷² Lord Diplock gives a summary of this close relationship stating that "[g]oods in transit inevitably run the risk of being lost or stolen, damaged or destroyed. The risk can be reduced, but not eliminated, by physical precautions taken by those persons having custody of the goods during the transit...but, taking precautions costs money, which is included in the cost of transport and adds to the cost of the goods at their destination. That expenditure is unproductive to the extent that it exceeds the cost of any loss or diminution in the value of the goods in transit which would have occurred if the precautions had not been taken. The economic aim of any law relating to the contract of carriage should be to encourage custodians of goods in transit to take those precautions, and no more, which on this basis are economically productive." In Lord Diplock, 'Conventions and Morals-Limitation Clauses in International Maritime Conventions', (1970) JMLC 525, at pp.525-526.

¹⁷³ Makins, B., 'The Hamburg Rules: A Casualty?' (1994) 96 Il Diritto Marittimo 637, p.652. It was stated that the "[m]andatory marine cargo liability regime is to allocate financial risk between the carrier and the cargo interests in an economically efficient manner...thus protecting the credit of the bill of lading (or other transport document) as an instrument of currency in international trade."

taken by the carrier as a result of the fear of an increase in his P&I calls (or premiums) or when the insurer's recovery costs would be greater than the cost of the total loss of the cargo.¹⁷⁴

- The Principle of Inconsistency with other Transport Modes

One can criticise that the nautical fault defence under the Hague/Hague-Visby Rules is not consistent with inland transport conventions. All other liability conventions impose upon the carrier the liability for cargo loss or damage arising out of or resulting from the negligence of the carrier or his agents, servants or any person employed by him.¹⁷⁵ As explained in Chapter Five,¹⁷⁶ the scope of application of the Rotterdam Rules is for door-to-door carriage rather than simply for tackle-to-tackle carriage. Therefore, disregarding and deleting the 'navigational error' exclusion, a feature especially applicable to sea carriage, would only make the marine transport liability under the Rotterdam Rules more compatible with the rest of the inland transport conventions.

3.9.3 Phase Three: Article 17(5) - The Proof of Unseaworthiness of the Vessel and the Carrier's Proof of Due Diligence

¹⁷⁴ Makins, B., 'The Hamburg Rules: A Casualty', (1994) 96 *Il Diritto Marittimo* 637, p.666.

¹⁷⁵ In air carriage, for example, a carrier can be exempted from liability for the loss or damage to cargo where the carrier successfully proves he or his agent took '*all necessary measures to avoid the damage or where it was impossible for him or them to take such measures*' (Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) 1929, Article 18(1)). The CMR Convention imposes absolute liability on the carrier that he should keep the vehicle in good condition and that he should be liable for any neglect of a person from whom he may have hired the vehicle or neglect the agents or servants of the latter (Article 3 and 17(3) of the CMR Convention).

¹⁷⁶ See para. 5.3, at p.336.

Article 17(5) introduces a new provision with regard to the carrier's liability for loss, damage or delay caused wholly or partly by the breach of the seaworthiness obligation. It provides that the carrier will also be liable for all or part of the loss, damage or delay if the cargo-claimant establishes that the vessel was unseaworthy and the unseaworthiness was the probable cause of, or contributed to, the loss. However, the burden of proof then shifts onto the carrier who will avoid liability if he establishes that the unseaworthiness was not a causative event or circumstances or he had exercised due diligence to make the vessel seaworthy pursuant to Article 14.

Article 17(5) (a) requires the cargo-claimant to prove that the loss, damage, or delay was or was '*probably caused by or contributed to*' the unseaworthiness.¹⁷⁷

3.9.3.1 Article 17(5)(a): Claimant's Proof that the Vessel was Unseaworthy

Article 17(5)(a)¹⁷⁸ more or less affirmed the approach adopted under the Hague/Hague-Visby Rules,¹⁷⁹ that the claimant may prove that the loss, damage, or delay was, or was probably, caused by the vessel's unseaworthiness or the improper crewing, equipping, and supplying of the

¹⁷⁷ Article 17(5)(a); see A/CN.9/572 - *Report of Working Group III (Transport Law) on the work of its fourteenth session*, para.20, 23-26, 30-31, 33; cf. A/CN.9/544 - *Report of Working Group III (Transport Law) on the work of its twelfth session*, para.131-132.

¹⁷⁸ "The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:

(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods..."

¹⁷⁹ *The Europa* [1908] P 84, pp.97-98; *Smith, Hogg & Co Ltd v Black Sea and General Insurance Co. Ltd* [1940] AC 997, pp.1004-1005.

vessel, or the fact that the holds, with the addition of the containers supplied by the carrier, were not fit and safe for the reception, carriage and preservation of the goods or he may prove that any of the above causes contributed to such loss, damage, or delay. However, there may be a question raised as to the effect of this new wording on the burden of proof for unseaworthiness. The answer to this question may also answer the question as to whether Article 17(5)(a) makes it easier for the cargo-claimant to prove unseaworthiness. Arguably, the interpretation and/or application of Article 17(5)(a) may also determine the effect of the container's cargoworthiness and of the carrier's ongoing obligation of due diligence as regards his liability.

3.9.3.2 Determining the 'probable' Standard of Causation

A close reading of Article 17(5)(a) reveals two points worth commenting on. First, it is clear from the language of Article 17(5) that, like all other international conventions, the Rules are not intended to define a standard of proof for the cargo-claimant in asserting his case. This is left for national law to decide.¹⁸⁰ The standard of proof is a procedural matter and all questions relating to procedure are decided according to the court's national law (the *lex fori*), which extends to questions concerning evidence; for example, the admissibility and weight of different kinds of evidence.¹⁸¹

¹⁸⁰ Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003), para.131. See Sturley M. et al., *The Rotterdam Rules - The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters, 2010), p.113; von Ziegler, A., 'Liability of the Carrier for Loss, Damage or Delay' cited as Chapter 5 of von Ziegler, A., *The Rotterdam Rules 2008: Commentary to the United Nations Conventions on Contracts for the International Carriage of Goods (Wholly or Partly) by Sea*, (Wolters Kluwer, 2010), p.109.

¹⁸¹ Braekhus, S., 'The Hague Rules Catalogue - Article IV, r.2, paragraph (c) to (p) of the 1924 Bills of Lading Convention' cited as Chapter 1 in Kurt Gronfors, *Six Lectures on the Hague Rules*, (Akademiforlaget-Gumperts, 1967), p.23. The Rotterdam Rules were drafted with the

Secondly, the phrase ‘probably’ in the provision refers to both the words ‘caused’ and ‘contributed’. This might cause an inquiry as to whether a court will apply differing degrees or levels of probability between these two words and this will inevitably include an inquiry into the interpretation of the word ‘probable’ within the context of Article 17(5)(a). It has been argued¹⁸² that the applicable standard of probability should not be the same as the standard that various national courts would apply for the burden of proof in terms of causation but that it should be somewhat lower. However, because the matter is left to national courts and given that most of the complex provisions of any new Conventions are in practice to be interpreted and applied by national courts, it is arguable that the same standard will be applied to the word ‘probably’ as is currently applied to causation. This would effectively mean that the word ‘probably’ in Article 17(5)(a) could be taken as referring to a standard equal to that of ‘on the balance of probabilities’.¹⁸³

3.9.3.3 The Potential Interpretation by the English Courts

In turn, it follows from the above that when the level of ‘causation’ (level of probability) differs, the standard of required evidence will vary as well. This will

intention of having as wide an application as possible and this might be a reason for not including in the Rules an explanation or a definition of the word ‘probably’. Consequently, the courts in different jurisdictions will determine the amount and kind of evidence required. Naturally, this will depend on the interpretation that will be given by various national courts to the phrase ‘probable cause’ and in turn this may vary from one jurisdiction to another. In other words, the standard or degree or level of probability is left entirely to national courts, which will have to decide on a case-by-case basis whether the cargo-claimant has satisfied that standard; see in this respect Hannu Honka, ‘Main Obligations and Liabilities of the Carrier’, (2004), *Transportrecht*, 279-284, p.281.

¹⁸² See Sturley M. et al., *The Rotterdam Rules - The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters, 2010), pp.113-114.

¹⁸³ Braekhus, S., ‘The Hague Rules Catalogue - Article IV, r.2, paragraph (c) to (p) of the 1924 Bills of Lading Convention’ cited as Chapter 1 in Kurt Gronfors, *Six Lectures on the Hague Rules*, (Akademiforlaget-Gumperts, 1967), p.24.

arguably be the case not only from one jurisdiction to another¹⁸⁴ but also from one case to another within similar jurisdictions involving interplay between the ‘procedural law of the jurisdiction...and thesubstantive laws’.¹⁸⁵ This might depend to some degree on the readiness of the court to consider the difficulties associated with the carrier’s due diligence obligation as extended throughout the whole voyage. These difficulties might encourage the English courts to interpret the word ‘probably’ as referring to the ‘balance of probabilities’. The principle of the ‘balance of probabilities’ is in itself merely a response of the courts to problems of evidential impossibility. When there are two or more possible competing or contributing causes of a known outcome and it cannot be said with some degree of certainty which of them was *the* cause, it would be enough to show which of them was the more probable.¹⁸⁶ The matter of differences between the two types of causes (competing or contributing) is discussed in the Report of Working Group III of the Rotterdam Rules on the work of its 12th session.¹⁸⁷ It was suggested that “*In the case of concurring [or contributing] causes, each event caused part of the damage but none of these events alone was sufficient to cause the entire damage (for example, where the damage was attributable to both weak packaging by the shipper [Article 17(3)(k)] and improper storage by the carrier [which caused unseaworthiness])*.”¹⁸⁸

It is submitted that English courts should appreciate the difficulties faced by the claimant and should not interpret the word ‘probably’ as referring to the ‘balance

¹⁸⁴ See Sturley M. et al., *The Rotterdam Rules - The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters, 2010), pp.113-114.

¹⁸⁵ von Ziegler, A., ‘Liability of the Carrier for Loss, Damage or Delay’ cited as Chapter 5 of von Ziegler, A., *The Rotterdam Rules 2008: Commentary to the United Nations Conventions on Contracts for the International Carriage of Goods (Wholly or Partly) by Sea*, (Wolters Kluwer, 2010), p.108.

¹⁸⁶ See Peel, E., ‘Lost chances and proportionate recovery’, (2006) LMCLQ 289, p.294.

¹⁸⁷ Document A/CN.9/544, p.42-45.

¹⁸⁸ Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 Oct 2003): Document A/CN.9/544, para. 142.

of probabilities' standard.¹⁸⁹ Nonetheless, the cargo-claimant should be taken to have satisfied the probability threshold even if he has not adequately satisfied the 'balance of probabilities' standard when he showed that the damage was probably caused or contributed to by the unseaworthiness of the vessel occurring at any stage of the voyage even if the carrier proved (by invoking Article 17(3)) that damage was likely to have been caused partially by an excepted peril. This is to say that if the carrier argues that the damage was caused by an excluded peril under Article 17(3), the claimant's burden of proving causation, under Article 17(5)(a), should be considered to be adequately discharged if he proves that "*a sufficient causal connection exists between an unseaworthy condition and the relevant loss.*"¹⁹⁰

In the case of competing causes, "*the court might have to identify an event or the fault of one party as having caused the entire damage, irrespective of the fault of the other party (for example, where the goods were damaged as a result of artillery fire hitting the vessel, a decision might need to be made as to whether the artillery fire was to be regarded as the only cause of the damage, irrespective of the fault the master of the vessel might have committed by bringing the ship into a war zone).*"¹⁹¹ However, it was pointed out that in this second situation [competing causes]; the doctrine of "overriding obligations" would often apply. "It was suggested that draft article 14 [now Article 17] dealt only with the situation where concurring faults were at stake and not with the

¹⁸⁹ See Treitel, G. and Reynolds, F., *Carver on Bills of Lading*, (Sweet & Maxwell, 3rd ed., 2011), para.10.020.

¹⁹⁰ See Sturley M. et al., *The Rotterdam Rules - The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters, 2010), para.5.095.

¹⁹¹ Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 Oct 2003): Document A/CN.9/544, para. 142.

second situation [described as competing causes].”¹⁹² No further explanation is given by the Working Group as to whether this meant that competing causes are not applicable under the Rotterdam Rules, perhaps, for the reason that the overriding obligation is no longer applicable under the Rotterdam Rules.¹⁹³ However, if one is assuming that other aspects of causation, e.g. competing causes, would still be applicable under the Rotterdam Rules, the reduced standard of probability on the claimant should extend to them.

For example, in *The Kite*,¹⁹⁴ the plaintiff’s cargo, while on board a barge that was being towed by a tug of the defendant, was damaged following the barge colliding with a bridge. The plaintiff brought an action in tort against the tug-owners. As there was a *prima facie* case of negligence against the tug owners, the plaintiff did not adduce any evidence and the defendant called the Master who had been in charge of the tug. The Master stated that he did not see the actual contact but heard the blow and saw the barge flared out owing, in his opinion, to the breast rope not having been properly made fast by the lighter’s servant as opposed to the tug’s servant. It was held that there was no greater probability that the accident happened as a result of negligence on the part of the tug owner’s servants or the lighteners’ servants. Applying the provisions of

¹⁹² Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 Oct 2003): Document A/CN.9/544, para. 142.

¹⁹³ Sturley, M., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters Limited, 2010), it was stated that: “in permitting an allocation of responsibility even when the carrier has breached its due diligence obligation, the Rotterdam Rules unequivocally reject the doctrine [of overriding obligation] that a carrier must exercise due diligence to furnish a seaworthy vessel before it is permitted to rely on its defence.”, at f.t. 215, p.116.

¹⁹⁴ See e.g., *The Kite* [1933] P. 154. The claimant’s goods, while on board of one of the lighteners’ barges, which with others was in tow by a tug, were damaged through the barge colliding with a bridge. The claimant brought an action against the tug owners, framing it entirely in tort. There was a *prima facie* case of negligence against the tug, the plaintiffs called no evidence on this point, and the defendants called one witness only, the master in charge of the tug, who did not see the actual contact but heard the blow and saw the barge ‘flared out’, owing, in his opinion, to the breast rope not having been properly made fast by the lighteners’ servant and not the tug’s servants.

the Rotterdam Rules to a similar case with competing possible causes of equal degrees of probability would have the opposite result. The word ‘probably’ in Article 17(5)(a) would be likely to reduce the required level of probability on the claimant (barge owner) from the full burden of proving causation that the carrier (tug owner) would be required to prove under Article 17(5)(b)(i). Thus, the standard under Article 17(5)(a) “reduced the burden on the claimant to prove the causation” and if it applied to a case that has more than one competing possible cause with an equal degree of probability, it would help the claimant to win the case.¹⁹⁵ This brings more fairness to the claimant who faces difficulty in gaining access to all the relevant facts that are needed to prove a causal reference to potential unseaworthiness.¹⁹⁶

It has been said that the interpretation of the word ‘probably’ will differ and may vary, according to facts, between ‘slightly’ or ‘very’.¹⁹⁷ Thus, the level of probability (or likelihood) would also be variable and not fixed depending on several factors. This may raise the question as to which benchmark is to be used by the courts for deciding the applicable level of probability in each case, as arguably, in any given case there may be a number of factors affecting the level of probability. These factors are explored below.

¹⁹⁵ It was stated that: “[t]he carrier is subject to the normal burden of proof under Article 17(5)(b) since that showing would be dispositive of the issue. In any event, Article 17(5)(b) uses the ordinary causation language that appears in the first paragraph of Article 17 and thus the standard is presumably the same.” See Sturley, M., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters Limited, 2010), para. 5.095

¹⁹⁶ von Ziegler, A., ‘Liability of the Carrier for Loss, Damage or Delay’ in von Ziegler, A. et al. (eds), *The Rotterdam Rules 2008*, (Kluwer Law International, New York, 2010), p.108.

¹⁹⁷ See Brons, W. R., ‘The Legal Position of the Carrier in the Light of the Rotterdam Rules’ cited as in Lagoni R. et al. (ed.), *Recent Developments in the Law of the Sea* (Schriften zum See - und Hafenrecht, 2010), pp.215-216; Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003), it was stated that the standard of probability is “*part way between full proof of causation for the damage and mere allegation of [unseaworthiness]*,” para.132.

3.9.3.4 Factors affecting the Level of Probability of Causation

As has been explained in Chapter Two (at para. 2.14.2) on due diligence, it is believed that the court may similarly rely in any given case on particular factors for interpretation of the word 'probably'. There are suggestions below as to what these factors may be.

a) Stage of the Voyage

Proving unseaworthiness after and/or during the voyage is a new option which differs from the current law.¹⁹⁸ Given that the obligation of due diligence is now a continuous one, it may be more difficult for the cargo-claimant to prove, as regards a vessel at sea, the causal connection of unseaworthiness with the damage or loss.¹⁹⁹ In practice, as far as cargoworthiness is concerned, the cargo-claimant might have better knowledge of the condition of the vessel's cargo holds whilst undertaking the cargo loading and stowage,²⁰⁰ or through a pre-loading inspection by their surveyor (or charterer's surveyor if other than the cargo-claimant).²⁰¹ It follows that it might be easier for the claimant to prove causative unseaworthiness relating to the period before, rather than after, the beginning of the voyage. This problem is partially solved by the readiness of the courts to infer unseaworthiness as damage occurred during the voyage.²⁰²

¹⁹⁸ See para. 3.9.3.5, at p. 245.

¹⁹⁹ See Treitel, G. and Reynolds, F., *Carver on Bills of Lading*, (Sweet & Maxwell, 3rd ed., 2011), para.10.020.

²⁰⁰ The Rotterdam Rules allow the carrier and the shipper/cargo-interests to agree that, the shipper, documentary shipper or consignee may perform the loading, handling, stowage, or unloading of cargo, thus validating the commonly used FIOS or similar clauses. See Article 13(2) and 17(3)(i).

²⁰¹ *Petrofina SA of Brussels v Compagnia Italiana Trasporto Olii Minerali of Genoa* (1937) 57 Ll. L. Rep. 247 (CA). The findings of a surveyor may be relevant in considering whether due diligence has been exercised. See for instance, *Empresa Cubana Imporan do de Alimentos Alimport v Iasmos Shipping Co SA (The Good Friend)* [1984] 2 Lloyd's Rep.586.

²⁰² *Madras v P & O* (1924) 18 Ll. L. R. 93, p.96; *Anderson v Morice* (1875) L. R. 10, C .P. 609, Affirmed (1876) 1 App.Cas 713; *Waddle v Wallsend* [1952] 2 Lloyd's Rep.105, p.139.

For a claim based on unseaworthiness to succeed, the claimant must prove the unseaworthiness of the vessel as well as the causal link between the unseaworthiness and the loss under Article 17(5)(a). For instance, if a cargo was damaged by an unexplained fire during the voyage, the carrier will respond to the claimant's *prima facie* case and will rely on Article 17(5)(b) to exclude all or part of his liability for the damage caused by the fire. In response, the claimant may prove that the crew were not familiar with the vessel's firefighting system (i.e. where the ship is new) and that the crew's incompetence renders the vessel unseaworthy.²⁰³ In this example, one important source of evidence from the ship could be a seafarer's testimony.²⁰⁴ It was stated that it was very likely that the fire occurred while the vessel was on the High Seas and damaged much of the ship's stores and supply resulting in inadequate hygiene and food of very little nutritional value.²⁰⁵ This may necessitate, prior to any investigation, medical assessments as to the crew's physical health. Such assessments would need to take place before any interviewing process took place. Such interviews may provide information in relation to the incompetence of the crew, which in turn may shed light on how the fire spread and consequently damaged the cargo. However, as a result of slow steaming, the vessel may take longer to reach a port of refuge or repair. This would add to the time taken to treat the crew before interview and will also affect: a- proving the incompetence and that the said incompetence is, b- the cause or the probable cause of the fire. Adding to that, if the fire spread to the location where records are kept, most of the evidence will be destroyed. Furthermore, the vessel may at the port of repair

²⁰³ See the example given in Sturley, M., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters Legal Ltd, 2010), pp.115 & 116.

²⁰⁴ Maclean, I., 'Secure the evidence', MRI, 19 Oct 2012, p.1.

²⁰⁵ Ibid.

start to remove most of the destroyed equipment in order to repair the ship. One can argue that the court should consider in a similar case the difficulties for the early collecting and securing of evidence that might prove not only the unseaworthiness of the vessel but also that the damage was, or was probably caused by, or contributed to by, the unseaworthiness/incompetence of the crew. The court should consider that “*an early assessment of the evidence is vital to determine the potential liability to, say, a fire*”²⁰⁶ and reducing the standard of causation from the normal standard imposed on the carrier when disproving the cause of the damage.

Therefore, a court, having in mind the above difficulties, might differentiate between the required levels of probability of causation in cases where the vessel is in port as compared to those where the vessel is at sea. In the latter, the level may well be lower.

b) The level of probability might depend on the standard of due diligence (standard of reasonableness) on the part of the carrier during the voyage

There may be an argument that the court should adopt a new approach that links the level of probability to the required standard of due diligence imposed on the carrier. As discussed in Chapter Two,²⁰⁷ the standard of due diligence is a question of fact depending on a number of factors including the type of the vessel, the cargo carried, the route followed,²⁰⁸ access to repair facilities, etc. If

²⁰⁶ Maclean, I., ‘Time to call in the expert?’ MRI, 01 June 2006, p.1.

²⁰⁷ See para. 2.14.2, at p. 135.

²⁰⁸ *Artemis Maritime Co. v S.W. Sugar Co.* [1951] AMC 1833 (4 Cir. 1951); for a general view, see Villareal, D., ‘The Concept of Due Diligence in Maritime Law’, (1971) 2 JMLC 763.

the element of causation is integrated with the concept of due diligence,²⁰⁹ these factors might then have a bearing on the level of probability of causation and will vary in accordance with the standard of due diligence. Take for instance a ship carrying cargo owned by a single person that was damaged by a defect (such as a crack that allowed seawater into one compartment), which emerged during the voyage. If the carrier did not repair the defect until arrival of the vessel at the port of discharge, the claimant, in order to prove that the extent of damage could have been less than it would have been if due diligence had been exercised, may need to prove that the damage was or was probably caused by or contributed to as a result of the carrier not exercising due diligence. For example, in mitigating the loss and stopping the flow of water from spreading to other cargo holds. Second, the claimant may need to prove that the cause or the probable cause of loss resulted from the carrier's failure to repair the defect on board, as long as such defects were repairable on board. Alternatively, it may be proved that the defect necessitated the services of technical experts and that the damage that occurred to the second compartment was caused or was probably caused by unseaworthiness that was exacerbated by not calling at an intermediate port. In effect, the carrier has continued without making any repairs at an intermediate port that could have prevented much of cargo in the second compartment from being damaged.²¹⁰ In this type of scenario, the carrier, in order to discharge his obligation, should demonstrate that he exercised due diligence in keeping the vessel seaworthy by carrying out two things; first, mitigating the cargo loss by preventing the water

²⁰⁹ Derrington, S., 'Due Diligence, Causation and Article 4(2) of the Hague-Visby Rules', (1997) Third International Trade and Business Law Annually, 175-186, p.186.

²¹⁰ The motive for not carrying out a repair at an intermediate port would be that the cost of repair at the intermediate port is more expensive than at the port of discharge.

from reaching the second compartment; second, repairing the defect (if it is repairable by ship's crew) or calling at the nearest port of repair if the type of defect is not repairable on board. The damage would have been less if the carrier, at least, had effected one of the above actions. For instance, the carrier may have admitted that the defect is not repairable on board and that there was an intermediate port of repair closer than the port of discharge but he refrained from taking the ship to the intermediate port and relied on Article 17(5)(l), namely, "saving or attempting to save life at sea". For that reason he did not divert to the intermediate port of repair to carry out a repair but continued to save life at sea. The claimant proves that the ship was unseaworthy, pursuant to Article 17(5)(a)(i), in failing to stop the flow of water from running to the second compartment and that the unseaworthiness was probably a cause of damage to the cargo in the second compartment. This scenario obviously contains more than one obligation on the carrier to keep the vessel seaworthy thus this might give bearing to the court to reduce the level of probability. Had he not succeeded in relying on Article 17(3)(l), the claimant could have proved unseaworthiness as a result of not going to an intermediate port of repair. Second, the carrier failed to keep the vessel seaworthy in failing to stop the flow to the second compartment and that unseaworthiness was probably a cause of damage to the second cargo hold. The court should consider the difficulties faced by the claimant and allow for a reduced standard of probability of causation in cases where the obligation on the carrier to keep the vessel seaworthy is heightened, as this will affect the level of probability of causation as seen in the above example.

c) Differentiation between Proving the ‘cause of’ or ‘contribution to’ Unseaworthiness

Under the current law, in assessing whether the carrier is responsible for loss or damage, the claimant has to prove that the loss was one ‘*arising or resulting from unseaworthiness*’.²¹¹ The liability for unseaworthiness will follow in cases where the unseaworthiness was one of the causes of the loss regardless of whether there have been other causes contributing to the loss for which the shipowner could have ordinarily excluded his liability under the exceptions listed in the Hague/Hague-Visby Rules. This is what seems to have been in the mind of Lord Wright in *Smith Hogg & Co v Black Sea & Baltic Ins. Co.*,²¹² with whom other members of the House of Lords agreed.²¹³ In this case, the vessel had listed to port on taking bunkers because of the combined effect of poor seamanship on the part of the master who was excused under Article IV, r.2(a) and because of the instability of the vessel as she was overloaded at the port of departure; a fact that rendered her unseaworthy. The House of Lords held that the unseaworthiness caused the loss. It follows that the standard of causation is affirmed to be singular and this was also confirmed elsewhere where the same test was being used, regardless of whether other perils had contributed to the

²¹¹ Article IV, r.1.

²¹² *Smith Hogg & Co. v Black Sea & Baltic Ins. Co.* [1940] A.C. 997.

²¹³ *Smith Hogg & Co. v Black Sea & Baltic Ins. Co.* [1940] A.C. 997, “...the shipowner will be liable for any loss in which those other causes covered by exceptions co-operate, if unseaworthiness is a cause, or if it is preferred, a real, or effective or actual cause. In truth, unseaworthiness, which may assume according to the circumstances an almost indefinite variety, can never be the sole cause of the loss...The law is, I think, correctly stated by the late Judge Carver in the *Carriage of Goods by Sea*, s.17 (fourth edition) published in 1905. The words of the section are: And further the shipowner remains responsible for loss or damage to the goods, however caused, if the ship was not in a seaworthy condition when she commenced her voyage and if the loss could not have arisen but for that unseaworthiness,” pp.1004-1005. A different but obiter view was expressed in *The Apostolis* (No.1) [1996] 1 Lloyd’s Rep. 475, p.483, per Tuckey J; reversed on other grounds [1997] 2 Lloyd’s Rep. 241 (C.A.).

loss.²¹⁴ It is important, however, to note that in the cases referred to above, it was stated that for causation purposes we ‘*must also look at the whole complex of circumstances*’ and should approach the issue ‘*in a broad common-sense way*.’ If this flexible and broad common-sense notion is adopted under the Rotterdam Rules, a different standard of probability should then be applied between cases where loss, damage or delay was caused by unseaworthiness and cases where the unseaworthiness merely contributed to such loss, damage or delay.

Under the Rotterdam Rules, the carrier is liable for ‘all or part of the loss, damage or delay if (a) the claimant proves that the loss, damage, or delay was probably caused or contributed to by (i) the unseaworthiness of the ship...[and its variants].’ One would wonder first, whether the word ‘probable’ in Article 17(5)(a) also qualifies the word ‘contributed’ or whether it should qualify merely the word ‘cause’. Second, whether the level of probability of ‘causation’ differs from the level of probability of ‘contribution to’ the unseaworthiness of the vessel.

Assessing the meaning of the words ‘cause’ and ‘contribute’ would be a good way of addressing the issue. The ordinary meaning of the word ‘cause’ is “a person, thing, event, state, or action that produces an effect”.²¹⁵ In light of the Rotterdam Rules, one can define the word “cause” as an event [unseaworthiness] that produces an effect (namely, loss, damage, or delay).

²¹⁴ *Smith Hogg & Co. v Black Sea & Baltic Ins. Co.* [1940] A.C. 997, per Lord Wright. “*The sole question, apart from express, must then be: ‘Was that breach of contract ‘a’ cause of the damage’.* It may be preferred to describe it as an effective or real cause though the adjective in my opinion in fact adds nothing. If the question is answered in the affirmative the shipowner is liable though there were other co-operating causes, whether they are such causes as perils of the seas, fire and similar matters, or causes due to human action, such as the acts or omissions of the master, whether negligent or not or a combination of both kinds of cause,” pp.1004-1005. Support for the ‘but for’ view can also be found in a statement by Neill, J in *The Tolmidis* [1983] 1 Lloyd’s Rep. 530, p.540.

²¹⁵ The Collins English Dictionary, (Collins, 2nd ed., 1989).

The Collins dictionary²¹⁶ defines the term ‘contribute’ as being partly responsible for. Therefore, under the Rotterdam Rules, for unseaworthiness to ‘contribute’ to the damage, it must be partly responsible for the event, e.g. the ingress of water, and consequently increase the severity of the loss, damage or delay. Some concerns were given during the drafting process that the phrase “contributed to” should not suggest *“that if the carrier was in any way responsible for any portion of the loss, even only 5 per cent of it, then the carrier would be liable for the entire loss.”*²¹⁷ But it should be construed as if *“the carrier was liable only to the extent it had contributed to the loss or damage”*.²¹⁸ In practice, the phrase ‘contribute to’ might mean that entire damage of a particular cargo resulted from more than one cause. The claimant can pursue a claim of unseaworthiness against the carrier pursuant to Article 17(5)(a) in two ways. First, when the claimant “proves that the loss, damage, or delay was or was probably caused by [...] (i) the unseaworthiness of the ship...” This means that the claimant should pursue a claim of unseaworthiness assuming from the evidence available to him that the loss/damage/delay resulted from one element, e.g. unseaworthiness, and no other factors, such as the excluded perils under Article 17(3) or Article 17(2), were involved in effecting the loss/damage/delay. In other words, even if the carrier has argued that the damage was caused by one excluded peril under Article 17(2) or (3), then the phrase ‘cause’ in Article 17(5)(a) means that the claimant is proving that the damage resulted or probably resulted from unseaworthiness alone, regardless of whether the carrier has relied on an excepted peril or not. Alternatively, when the claimant “proves

²¹⁶ The Collins English Dictionary, (Collins, 2nd ed., 1989).

²¹⁷ Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003), para.94.

²¹⁸ Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003), para.94.

that the loss, damage, or delay was or was probably [...] contributed to by (i) the unseaworthiness of the ship...” This means that the claimant should pursue a claim of unseaworthiness, assuming from the evidence available to him, that the loss/damage/delay resulted or probably resulted partially from unseaworthiness and partially by the excluded peril under Article 17(3) or Article 17(2) relied upon by the carrier. In other words, the claimant is admitting that part of the damage resulted from some other factors such as the expected perils which the carrier relied on. But the claimant need only prove that part of the damaged cargo resulted from unseaworthiness. The phrase ‘contribute’ in Article 17(5)(a) means that the claimant has a burden to prove the causation as regards the damaged cargo. Admitting that the damaged cargo resulted, to some extent, from an excluded peril and unseaworthiness has added to the severity of the damage. In other words, the amount of damage would have been less had the vessel been seaworthy. It is important to mention that in both of the above options, the claimant “*should be required to prove both the unseaworthiness and that it caused or could reasonably have caused the loss or damage*”.²¹⁹ It can be seen that it is easier, at least theoretically, for the claimant to prove damage that was caused partially by unseaworthiness in comparison to proving damage that was caused solely by unseaworthiness. Take for an example, a fire that started in one of the cargo holds and spread to another cargo hold. The carrier argued that an unexplained fire started in the first cargo hold and spread to the second cargo hold and relied on Article 17(3)(f) to avoid liability. Assuming that the claimant concedes that the carrier is not responsible for the damage caused by the unexplained fire in the first cargo hold, but he has

²¹⁹ Report of Working Group III (Transport Law) on the work of its fourteenth session (Vienna, 29 November-10 December 2004), 14th Session Report, para.24.

chosen to prove that part of the damaged cargo in the second cargo hold was contributed to by unseaworthiness. This might be an easier task to carry out as opposed to proving that the cause of the damage for both cargo holds where the claimant would need to prove unseaworthiness and prove each cause of damage. The relevant evidence and facts that are needed to prove causation are likely to be fewer and easier to collect. Thus, it might be logical if courts assume that the word 'probably' should apply to the word 'cause' only. Although the Rotterdam Rules are silent on whether the phrase 'probably' applies to the phrase 'contributed', Sturley argues that the word 'probably' applies only to the word 'caused'.²²⁰ Adding the word 'probably' is "*a recognition by the drafter of the difficulties for the claimant to gain access to all the relevant facts that are needed to form an allegation of causal relevance of unseaworthiness.*"²²¹ This statement acknowledges the level of difficulties faced by the claimant when proving that the cargo damage was caused solely by unseaworthiness. This is believed to be similar to the level of difficulties faced by the same claimant who instead wishes to prove that the damaged was contributed to by unseaworthiness. The difficulty that arises in gaining access to the relevant facts arises irrespective of whether he is seeking to prove that the cargo damage was caused by or contributed to by unseaworthiness. Thus, some courts might consider that the word 'probable' in Article 17(5)(a) qualifies not only the word 'cause' but also the word 'contributed'.

Currently, under the Rotterdam Rules, it is unknown whether the court will be prepared to draw an inference of unseaworthiness in circumstances where

²²⁰ Sturley, M., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters Legal Ltd, 2010), para.5.097.

²²¹ von Ziegler, A., 'Liability of the Carrier for Loss, Damage or Delay' in von Ziegler, A. et al. (eds.), *The Rotterdam Rules 2008*, (Kluwer Law International, New York, 2010), p.108.

another cause has contributed to the loss. Arguably, it is less likely for the court to draw an inference of unseaworthiness because case law on unseaworthiness and causation is to the effect that an inference is only drawn in circumstances where the carrier is not able to provide the cause of the loss or, on a balance of probabilities, an adequate counter-argument. Thus, if the same approach is adopted under the Rotterdam Rules, it can reasonably be assumed that when unseaworthiness is considered as a contributory cause of the loss, the required level of probability as regards causation is unlikely to be the same as that where unseaworthiness is considered to be the sole cause of the loss.

d) Increase of Risk causing an Increase of the Probability of Loss as an Alternative in Establishing the Causal Connection

The word 'probable' as a qualifying epithet to the words 'cause' or 'contribution' in respect of the loss, damage or delay might be interpreted to impart a less exacting standard of causative proof. If so, the problem of some evidential shortcomings in any given case for which no one is to be blamed but which prevent the making of the causal connection between unseaworthiness and the loss would be solved. Further, the carrier's ongoing due diligence obligation for the entire voyage may create the setting for a situation where, subsequent to an initially excluded cause, the carrier's act(s) or omission(s) may be taken to have increased the risk to the cargo and contributed to the loss. For example, even where a carrier has fulfilled his obligation of exercising due diligence (before and at the beginning of the voyage), if a defect manifests during the voyage that could only be fixed by a specialist, the risk to the cargo would nonetheless be

increased should the carrier decided to carry out temporary repairs. If the carrier decided to carry out temporary repairs (i.e. complying with the minimum required standard of due diligence) instead of carrying out permanent repairs by calling at the nearest repair port, which would have minimised or completely eliminated the risk of loss, the decision to carry out temporary repairs may be taken to be a contributory cause to the subsequent loss. The carrier's decision not to perform permanent repairs may be taken to have materially increased the risk of loss²²² and this might suffice to establish the causal connection²²³ between unseaworthiness and the loss, and as a consequence, a lack of due diligence. In other words, a failure by the carrier to comply with a higher standard of due diligence (e.g. higher in a practical sense), which, as a result, increased the risk of loss, damage or delay would be taken as a failure to exercise due diligence to keep the vessel seaworthy which, in turn, would amount to a 'material contribution' to the loss, damage or delay. The alteration of risk principle is recognised outside shipping law. In the tort of negligence case, *McGhee v National Coal Board*,²²⁴ the claimant was employed to work in hot and dusty conditions without any cleaning facilities. Consequently, he cycled home each day caked in dust and sweat and contracted dermatitis. Although it was impossible to prove medically that, but for the dust, he would not have contracted the disease, the House of Lords held that the evidential gap ought to be filled by the employer,²²⁵ whose exercise of precaution would have prevented the increased risk to the employee.²²⁶

²²² Those circumstances are considered in the previous Chapter. See the discussion under the practical aspects of remedying unseaworthiness after the commencement of the voyage.

²²³ See *McGhee v National Coal Board* [1972] 3 All E.R. 1008.

²²⁴ *McGhee v National Coal Board* [1973] 1 W.L.R. 1; [1972] 3 All E.R. 1008.

²²⁵ See Boon, A., 'Causation and the increase of risk', (1988) 51 *The Modern Law Review*, 508-516, discussed in the case, *Wisher v Essex Area Health Authority* [1988] A.C. 1074. When the

Now, the interpretation of the word 'probably', as a qualification to the words 'caused' or 'contributed' in Article 17(5)(a) might assist to adopt the alteration of risk principle that lowers the burden on the claimant to prove the cause of his loss. By the same analogy, it would suffice for causation purposes if the claimant proved that the loss was 'probably' caused, or contributed to, by the increased risk.²²⁷ Also, in *The Fiona*,²²⁸ the Court of Appeal was reluctant to uphold that the above principle applies generally to all claims.²²⁹ However, one could argue that if the court is ready to infer unseaworthiness without strong proof and also recognises the difficulties that a cargo-claimant faces to prove unseaworthiness during the voyage, it should be prepared to fill in the evidential gaps as an alternative to establishing causation, which does not require elaborate legal doctrines.²³⁰

e) Duty to Facilitate the Taking of Evidence - Article 23(6)

majority of the Court of Appeal attempted to bridge the evidential gap created by relying on the principle from *McGhee*; the House of Lords reversed the Court of Appeal and distinguished *McGhee*. The court ruled, *inter alia*, that the court may infer the causation only if it was proved by the plaintiff that the defendant had 'materially increased the risk' of injuring the plaintiff.

²²⁶ Also, see *Fairchild v Glenhaven Funeral Service Ltd* [2003] 1 A.C. 32, where the House of Lords ruled that a person who had contracted mesothelioma as a result of wrongful exposure to asbestos at different periods by more than one negligent employer could sue any of them, even though the claimant could not prove which exposure caused the disease (i.e. the claimant could not show on a balance of probabilities which exposure had caused the disease) because all of the employers concerned had materially contributed to the risk of the disease. In *Fairchild, McGhee v National Coal Board* [1973] 1 W.L.R. 1 was applied but distinguished *Wilsher v Essex AHA* [1988] A.C. 1074. Proof, on a balance of probabilities, that the wrongdoing of each employer had materially increased the risk to the employee that he might contract the disease was to be taken as proof that each employer had materially contributed to it.

²²⁷ *A/S Rendal v Arcos Ltd* (1937) 58 Ll. L. Rep. 278.

²²⁸ *The Fiona* [1994] 2 Lloyd's Rep. 506.

²²⁹ *The Fiona* [1994] 2 Lloyd's Rep. 506. Hirst LJ emphasised that the "*class of cases including the A/S Rendal case are in a spate category of their own and do not lay down any general principle*", p.519. He stated that to hold that the cases lay down a general principle as to the incidence of proof would be in direct conflict with the decision in *Wisher v Essex Area Health Authority* [1988] A.C. 1074. The case decided that in the allocation of the burden of proof in ordinary contract claims, the plaintiff bears the legal burden to establish causation.

²³⁰ In the words of Lord Reid "*...the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man's mind works in the everyday affairs of life.*" *McGhee v National Coal Board* [1972] 3 All E.R. 1008, p.1011.

Article 23(6) of the Rotterdam Rules provides that ‘[i]n the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and tallying the goods²³¹ and shall provide access to records and documents relevant to the carriage of the goods’ (emphasis added). The emphasised text imposes a general obligation on all parties (not only the carrier) to disclose material information to the other party where there is an actual or apprehended loss of, or damage to, the goods. This would, probably, include access to information such as temperature charts, loading plans, logbooks, police reports, survey reports and more importantly, ISM records.²³² The interpretation of such a duty would vary in accordance with the procedural provisions of the *lex fori* of each Contracting State and thus the amount of access to the information would vary from country to country.²³³ If this is true, the word ‘probably’ might be regarded as superficial when the court interprets Article 23(6) to impose, on the carrier, maximum access to the relevant information.²³⁴ Further, there is no provision and, therefore, it is unclear what the penalty would be for breach of that duty.²³⁵ The non-disclosure of (existing) evidence by the carrier might suffice for raising an adverse inference making it unnecessary for the claimant to demonstrate a ‘probable’ causal

²³¹ I.e. Article III, r.6 (fifth paragraph) of the Hague/Hague-Visby Rules.

²³² See, e.g. Honka, H., ‘The Standard of the Vessel and the ISM Code’ cited as Chapter 4 in Schelin, J. (ed.), *Modern Law of Charterparties*, (University of Stockholm, 2002), where it was stated that “the system created by the ISM Code may play an important role [in causation] as far as the owner’s liability is concerned,” p.118.

²³³ Although the records of shipping industry regulations, e.g. the ISM records, might help the claimant in proving unseaworthiness, the uncertainty regarding the standard of proof makes proving the cause of loss to be unknown as whether the records (e.g. ISM records) will or will not be regarded under the new probability level of causation as a full evidence of causation. See e.g. Grivin, S, *Carriage of Goods by Sea*, (Oxford University Press, 2nd ed., 2011), para.24.17.

²³⁴ It is another matter how forceful national rules on discovery are and what limitations might exist. For example, the ISM Code would in most cases aid in the determination of the causal connection between the damage and the unseaworthiness. However, under English procedural law, when litigation commences, the litigants are not obliged to disclose documents until the disclosure stage, unless there is an order for early disclosure.

²³⁵ Baatz Y., Debattista C., Lorenzo F., Serdy A., Staniland H. and Tsimplis M., *Rotterdam Rules: A Practical Annotation* (2009) para. 23.05;

connection and in turn shifting the burden of proof to the carrier.²³⁶ On the other hand, the unveiling of evidence would not always be regarded as evidence against the carrier.²³⁷ It has been held that ‘...an adverse inference from the non-production of evidence may not be used to satisfy [the claimant’s] evidential burden of proof until the burden of production has been shifted [to the carrier].’²³⁸

The final point to highlight is the submission by some commentators²³⁹ that the only fact that speaks for itself under the Rotterdam Rules is that the court, insofar as proof of causal connection with unseaworthiness is concerned, should refrain from adopting any concept of strict proof. For causation purposes, the Rules intended to indicate a burden of proof lower than the normal one and this has been the result of a compromise.²⁴⁰ In order to redress the balance, however, the carrier can still escape part of the liability even if he did not exactly

²³⁶ *Olbert Metal Sales Ltd v Cerescorp Inc.* (1996) 126 F.T.R. 161, at p.166 (Fed. C. Canada); see also *The Theodegmon* [1990] 1 Lloyd’s Rep. 52, per Phillips J, “In the course of investigations aboard the *Theodegmon*, photographs were taken from what was said to be the engine bell book in use at the time of the grounding...this record is puzzling for a number of reasons. The book that was photographed vanished soon after the photographs were taken, but does not appear to have been a bell book that had been in continuous use in the engine room prior to the time of the grounding,” p.72. Cited in Tetley W., *Marine Cargo Claims*, (Blais, 4th ed., 2008), at p.343.

²³⁷ *Caemint Food Inc. v Lloyd Brasileiro* 647 F.2d 347, at p.356, 1981 AMC 1801, at p.1814 (2 Cir. 1981). There is no inference of improper ventilation found against the carrier. This is because it was agreed between the parties that the carrier routinely destroy after one year all charts showing the temperature and humidity inside the cargo holds. Cited in Tetley W., *Marine Cargo Claims*, (Blais, 4th ed., 2008), at p.344.

²³⁸ *Transatlantic Marine Claims Agency Inc v S.S. Zyrardo* 898 F.2d 137, 1990 AMC 2193, p.2196 (2 Cir. 1990); *The Toledo* [1995] 1 Lloyd’s Rep. 40, at p.5. The missing documentation helped to support the ultimate decision that the shipowner had not satisfied its burden of proving due diligence to make the vessel seaworthy. Cited in Tetley W., *Marine Cargo Claims*, (Blais, 4th ed., 2008), at p.345.

²³⁹ von Ziegler, A., ‘Liability of the Carrier for Loss, Damage or Delay’ in von Ziegler, A. et al. (eds.), *The Rotterdam Rules 2008*, (Kluwer Law International, New York, 2010), p. 108; Sturley, M., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters Legal Ltd, 2010), para. 5.094-5.095.

²⁴⁰ See under the above subtitle ‘History of drafting Article 17(5)’; See *Draft Instrument WP.36*, para.7, at 14(3) (first variation); 12th Session Report, para.130; 14th Session Report, para.20 (first variation of proposed Article 14(2)(C)); See *Draft Instrument WP.36*, para.7, Article 14(3)(second variation); 12th Session Report, para.130; 14th Session Report, para.20 (second variation of proposed Article 14(2)(C)); *Draft Instrument WP.36*, para.7, Article 14(3) (third variation).

prove the precise extent of the damage that was caused by the excluded peril.²⁴¹

It is important to mention that paragraph (5)(a) of Article 17 reflects the obligation of due diligence to provide a seaworthy vessel in Article 14. Consequently, a special reference must be made to the new features of seaworthiness. First, the obligation of exercising due diligence to provide a seaworthy vessel (cargoworthiness, human seaworthiness, vessel seaworthiness) is extended to the entire voyage and does not refer exclusively to unseaworthiness at the beginning of the voyage, and secondly, the inclusion of the container in the obligation of exercising due diligence. A question that may be raised is how these two new seaworthiness features will interact with Article 17(5)(a). An associated issue may be whether, and if so to what extent, there should be proof by one of the parties of the exact time of the 'event or circumstance' that caused the unseaworthiness.

3.9.3.5 The Exact Time of the Occurrence of the 'event or circumstance' that caused the Unseaworthiness: Is Proof Required?

This matter is not clear and has not been addressed so far. However, an attempt is made below to demonstrate, with no particular preference, the potential approaches that may be adopted by courts.

a) Proof is Not Required

²⁴¹ *Gosse Millerd v Canadian Government Merchant Marine* [1929] A.C. 223, p.241, per Lord Sumner. The situation under the Rotterdam Rules is different; if the carrier fails to prove his due diligence, then he might be partially liable if he shows, not necessarily the exact extent, but the proportion of damage attributable to the excepted peril alone.

Under the current law, if the evidence adduced by the claimant does not show a fault traceable to the period before or at the commencement of the voyage, the carrier will not be liable. The unseaworthiness and the defect must be attributed to the carrier's lack of due diligence before or at the commencement of the voyage regardless of whether the loss or damage occurred after the commencement of the voyage.²⁴² The Rotterdam Rules are silent as to whether the cargo-claimant needs to prove that a defect relates to the time before or after the beginning of the voyage. Given the now on-going due diligence obligation, this issue is of little or no importance. One may therefore surmise that this is the reason that there is no relevant provision in the Rotterdam Rules. If this is the case, the claimant will not be required to show any more than the vessel's unseaworthiness, regardless of the time of its occurrence. Consequently, the extension of the due diligence obligation for the entire voyage might be said to indirectly reduce the burden of proof on the cargo-claimant²⁴³ in that he is not required to prove unseaworthiness for the period before or at the beginning of the voyage only. This may result in an increased number of claims for damage caused by unseaworthiness.

Support for the above proposition can be given by reference to the language of Article 17(5)(a), which codifies the current law requirement for the *prima facie* proof of causative unseaworthiness.²⁴⁴ This codification does not include any

²⁴² *Cosmopolitan Shipping v Hatton & Cookson (The Rostellan)* (1929) 35 Ll. L. R. 117, p.125, per Scrutton LJ; *Walker v Dover Navigation* (1950) 83 Ll. L. R. 84; *The Muncaster Castle* [1959] 1 Q.B.74 (McNair J); *The Makedonia* [1962] 1 Lloyd's Rep. 316, p.338; *The Amstelslot* [1963] 2 Lloyd's Rep. 223, p.234, per Lord Devlin.

²⁴³ Clarke has referred to German commentators who conclude that to require the claimant to establish unseaworthiness at the beginning of the voyage rather than later might be to impose too onerous a burden of proof on the claimant. Clarke, M., 'The Carrier's Duty of Seaworthiness under the Hague Rules' is cited as Chapter 6 in Rose, F. (ed.), *Lex Mercatoria Essays on International Commercial Law in Honour of Francis Reynolds*, (LLP, 2000), p.117.

²⁴⁴ *Smith Hogg v Black Sea and Baltic Ins* [1940] A.C. 997. It was stated that: '*in carriage of goods by sea, unseaworthiness does not affect the carrier's liability unless it causes the loss*',

requirement to prove when the causative unseaworthiness occurred. Nonetheless, a court may need to decide whether the carrier had exercised due diligence. As it was argued above, if the court is content to apply a different standard of due diligence between the period before or at the commencement of the voyage and the period post-commencement, then by necessity it would need to examine whether the causative unseaworthiness occurred in port or at sea. In turn, the time when the defect manifested itself would be important and this would raise an inquiry as to the time and the period at which the carrier should have exercised his due diligence to 'make' or 'keep' the vessel seaworthy. Then, proof of the time of the 'event or circumstance' would be required.

b) Proof is Required

On the assumption that the court will apply a different standard of due diligence for the period before (including the commencement) and after the commencement of the voyage and, in this respect, will require that the time of the causative unseaworthiness be proved, one might question who should ascertain the exact time at which the unseaworthiness emerges.

Under the Hague/Hague-Visby Rules, the evidence adduced by the claimant should give an indication that damage to the cargo was caused by unseaworthiness of the vessel, which took place before the commencement of the voyage and if the carrier did not exercise due diligence before and at the

p.1004, per Lord Wright, applying the common law position in *The Europa* [1908], p.84; *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep. 265; for a case where there were manifestly wrong charts (which on the facts were held not to render the vessel unseaworthy) and a grounding but the causative link to the damage was not shown; cf. *Rey Banano del Pacifico C.A. v Transportes Nav Ecuatorianos (The Isla Fernandina)* [2000] 2 Lloyd's Rep. 15.

beginning of the voyage, he will be liable for his lack of exercising due diligence. If the unseaworthiness of the vessel related to a time after the commencement of the voyage, then the carrier will not be liable for unseaworthiness. This is because the carrier is only required to exercise due diligence at the period before and at the beginning of the voyage. “*Unseaworthiness does not give rise to a cause of action unless it consists of unfitness at the material time (which must be at the commencement of the voyage)*”.²⁴⁵ This might not be the case under the Rotterdam Rules. If a claimant proves (pursuant to Article 17(5)(a)) that the ship was unseaworthy in failing to have adequate navigation charts and that unseaworthiness was probably a cause of the damage to the cargo, it might not be necessary for the claimant to prove that the unseaworthiness caused the damage at the exact time that the unseaworthiness arose. This is because the carrier (pursuant to Article 17(5)(b)) has the burden of proving either that the damage was not caused by unseaworthiness, or that he exercised due diligence and by doing so, he would indicate the time when he exercised due diligence. In the above example, if the cargo-interest brought a claim for unseaworthiness based on defective charts which caused the vessel to run aground and consequently caused damage to the cargo, the carrier will need to demonstrate that he exercised due diligence in supplying the latest available chart. But what if the carrier failed to demonstrate that he exercised due diligence in applying the latest chart correction, which had been released 5 days prior to the vessel reaching her discharge port and prior to the grounding of the vessel? This would indicate that the carrier had exercised due diligence in

²⁴⁵ *De Carvalho v Kent Line* (1950) 26 M.P.R 77, p.87, per Dunfield J (Newfoundland Supreme Ct.). *Silcock v Maritime Lighterage* (1937) 57 Ll. L. R.78 (US District Ct.). *The Farrandoc* [1967] 2 Lloyd's Rep. 276, “the plaintiff...must prove unseaworthiness at [or now after] the commencement of the voyage which can be laid to the owners of their agents,” p. 284, per Noel J (Canada Exchequer Ct.).

supplying the vessel with adequate navigation charts, but he failed to demonstrate that he exercised due diligence (by making all the recent corrections on the navigational charts) after the beginning of the voyage and thus the vessel was unseaworthy as a result of the out of date chart. The claimant would not be required to prove the timing at which the unseaworthiness occurred. It is irrelevant to the claimant at what point the unseaworthiness arose. The issue as discussed above relates to the exercise of due diligence; any burden in respect of timing would be borne by the carrier.

Further, one might propose that the timing issue becomes even more relevant when seen from the multimodal container carriage perspective. It will not only be a question of before (including the commencement) or after the commencement of the voyage but also a question of before the port of loading and/or after the port of discharge. This will raise difficulties for the cargo-claimant.²⁴⁶

On the one hand, one could argue that the quality of the carrier's due diligence does not need to be examined until the claimant has first shown that the vessel was unseaworthy upon sailing. This is because *'the court may well hear evidence of diligence before it decides the question of seaworthiness and that the evidence may bear indirectly on the [ascertaining of the timing of the occurrence of the causative unseaworthiness]'*.²⁴⁷ Therefore, some courts might still follow the first of the two proposed approaches.

²⁴⁶ Simon Baughen, *Shipping Law*, (Cavendish, 2012), at p.123, fn 187. "It would be extremely difficult to determine the exact time at which the damage occurred, if the container was sealed on stuffing and a bill of lading with the clause 'said to contain'", were issued.

²⁴⁷ Clarke, M., *Aspect of The Hague Rules*, (Martinus Nijhoff, 1976), p.181.

c) Concurrency of Causative Unseaworthiness and Exempted Causes: Is Proof Required and by Whom

Article 17 provides for apportionment of liability if the damage was caused partially by a cause included in the exclusion list and partially by unseaworthiness. The liability of the carrier might depend on when the excluded cause had occurred. Therefore, in the context of the current discussion, this would raise the question of whether it is imperative for the claimant to prove that the unseaworthiness arose prior to the excepted peril.

Assume the claimant has proved the unseaworthiness of the vessel when, at the same time, the carrier is successfully relying on one of the exception clauses (e.g. perils of the seas). Additionally, assume that depending on the sequence of the occurrence of each of the two causes, the proportion of loss or damage attributed to each of them will be different and, in this respect, timing is crucial. The court, in determining the respective proportions, will decide²⁴⁸ the proportion of the loss or damage attributed to unseaworthiness on the basis of the point in time at which the 'event or circumstance' causing the unseaworthiness occurred and on the basis of whether this was before or after the excluded cause. Although there is no provision as to whether, and if so by which party, the time of the occurrence of the causative unseaworthiness must be proved, Article 15(b) provides that the burden is on the carrier to prove the exercise of due diligence. This might indirectly create the requirement to prove the time of the occurrence of the causative unseaworthiness and impose this burden on the carrier.

²⁴⁸ It was decided that further drafting was required to take into account that 'the intention of the draft paragraph was to grant courts the responsibility to allocate liability where there existed concurrent causes leading to the loss damage or delay, some of which the carrier was responsible for and for some of which it was not responsible.' See Report of the 14th Session, A/CN.9/572, para. 74.

3.9.4 Phase Four: Article 17(5)(b)(i) and (ii) - Disproving Unseaworthiness

Once causative unseaworthiness is successfully shown, the burden shifts onto the carrier who must (i) either (dis)prove, pursuant to Article 17(5)(b)(i), the causal connection between the unseaworthiness and the loss/damage/delay; or, (ii) prove, pursuant to Article 17(5)(b)(ii), that due diligence was exercised.²⁴⁹

Both options are available to the carrier. The question for the carrier would thus be which of the two defence avenues would be easier to pursue. It was discussed above²⁵⁰ that there is a possibility that an English court will interpret the word 'probably' as equal to that of 'on a balance of probabilities'.²⁵¹ This will frustrate the intention of easing the burden on the claimant of proving the causal connection between loss and seaworthiness if the court has not considered the difficulties faced by the claimant in gaining access to all the relevant facts that are needed. As a result, the standard in Article 17(5)(a) in proving that the damage was a 'probable' cause of the unseaworthiness will be similar to the standard of the burden in Article 17(5)(b)(i) in disproving that the damage was caused by the unseaworthiness.

Where the carrier relies on Article 17(3) to exclude himself from part of the liability for damage that was partially caused by unseaworthiness and partially by an excluded peril (under Article 17(3)), if the standard of causation to prove the connection between the damage and unseaworthiness is considered to be equal to a normal standard, i.e. not somewhat lower than the full burden of

²⁴⁹ Article 17(5)(b).

²⁵⁰ See para 3.9.3.3, at p. 225.

²⁵¹ Berlingieri, F., 'Revising the Rotterdam Rules', LMLCQ, 583, at p.600.

proving causation that applies elsewhere in Article 17,²⁵² the claimant might find it difficult to prove unseaworthiness.

After the claimant has established, under Article 17(1), *prima facie* evidence of loss or damage, the carrier may then rely on an exclusion listed in Article 17(3). What if the claimant managed to prove that the damage to his cargo was 'probably caused' by unseaworthiness according to Article 17(5)(a), and for financial reasons he did not engage adequately qualified experts to seek further evidence on the assumption that the facts he collected sufficed to satisfy the lower standard of proof; i.e. that the damage was caused by unseaworthiness as required under 'probably caused'? Given that the court has held that the standard of proof for causation required by 'probably caused' is similar to that of a balance of probabilities, the defendant carrier, on a balance of probabilities, will not be liable for the damage if he responds by proving under the normal standard that the damage was not caused by unseaworthiness. This scenario is likely to happen if the Rotterdam Rules are first adopted in a common law legal system. The standard required to prove that the damage was the cause of unseaworthiness will be unknown until paragraphs (5)(a) and (5)(b) of Article 17 are tested.

As a result, it might be argued that it will be more convenient for the carrier to disprove the fact that unseaworthiness caused the damage under Article 17(5)(b)(i) than proving the exercise of due diligence under Article 17(5)(b)(ii).²⁵³

²⁵² Sturley, M. et al., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters Legal Ltd, 2010), at para.5.095.

²⁵³ This is apparently true in the case of the carrier to prove the due diligence of his servant or contractors. A carrier is unlikely to succeed in a due diligence defence merely by showing that defects have not been detected by the relevant; i.e., classification society. See for example, *The Toledo* [1995] 1 Lloyd's Rep.40.

This might be true because, according to Article 17(5)(b)(ii), the carrier has to prove that *'it complied with its obligation to exercise due diligence pursuant to article 14'*. This perhaps requires that the carrier prove he exercised due diligence in relation to all aspects of unseaworthiness rather than just the cause suggested by the claimant. Unlike Article 17(5)(a), which provides three alternative avenues (responding to the three facets of seaworthiness; (i) ship seaworthiness, (ii) crew and equipment seaworthiness, and (iii) cargo-hold and container seaworthiness) that the claimant may elect to prove the cause of unseaworthiness.²⁵⁴ For instance, the claimant can prove that the damage was caused or was probably caused by unseaworthy cargo-holds, which corresponds only to paragraph (iii) (*'the fact that the holds or other parts of the ship in which the goods are carried...'*) as compared to the rest of Article 17(5)(a). In comparison, Article 17(5)(b) does not outline the three facets of seaworthiness. The carrier thus may be required to respond not only to the exact case that the claimant alleges, i.e. that the carrier failed to exercise due diligence in making the cargo holds seaworthy as required under Article 14(c). He is required to prove the fact that he had exercised due diligence with other facets of seaworthiness required under (a), (b) and (c) of Article 14.²⁵⁵ It is a very heavy burden to prove that the carrier exercised due diligence

²⁵⁴ See that under Article 17(5)(a) the carrier is given the choice to select from one of the three routes. "The claimant can prove that the loss, damage, or delay was or was probably caused by or contributed by [one of the following]: (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods."

²⁵⁵ Article 14 provides "*The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:*

- (a) *Make and keep the ship seaworthy;*
- (b) *Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and*
- (c) *Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation."*

correspondent to all of the facets of seaworthiness required under Article 14, especially now that the obligation is a continuous one.

It can be said that the claimant in a common law court, would not know whether he would benefit from the reduction on the level of probability in terms of causation. Until this is clarified, the claimant might face uncertainty as to the standard of proof in respect of the causation i.e. that the damage was caused by unseaworthiness, and therefore he should approach Article 17(5)(a) with great caution. Further, the imprecise drafting of Article 17(5)(b)(ii) might cause confusion as to whether the carrier is required to prove that he exercised due diligence generally or just in relation to the suggested unseaworthiness. Modification is proposed below.

3.10 Proposed Modification- Solution

As explained above, the Rotterdam Rules place on the shoulders of the cargo-claimant two tasks: to prove the unseaworthiness and also that the unseaworthiness caused or probably caused the loss, damage, or delay. As long as the word 'probably' is unlikely to make any change to the required standard of proof for unseaworthiness, the burden on the shoulders of the cargo-interests appears not too different from that under the Hague/Hague-Visby Rules. It has been mentioned above that the difficulties on the claimant in proving the cause of unseaworthiness consists of difficulties in relation to gaining access to all the relevant evidence that is needed to prove that the damage was caused by unseaworthiness. Article 23(6) obliges the parties to 'give reasonable facilities to each other for inspecting and tallying the goods and shall provide access to records and documents relevant to the carriage of the

goods.’ As mentioned earlier, there is no penalty for not complying with this obligation. Therefore, the carrier might not be encouraged to provide access to the claimant in relation to all of the relevant facts, which may help him to prove his case. It is suggested that Article 23(6) should be redrafted to include a penalty against the carrier who does not fulfil this obligation. Also, in order to overcome the difficulties faced by the claimant in proving that the damage caused by unseaworthiness and thus the uncertainty that will emerge from the different interpretation by courts in construing the word ‘probable’, one may suggest that the obligation under Article 23(6) should be regarded in Article 17(5)(a) as a solution to the difficulties faced by the claimant in proving the causation (the damage was caused by the unseaworthiness). In re-drafting paragraph 17(5), in order to redress the imbalance, the following line should be added to paragraph (6) to read as follows: “(a) *When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for the part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article; and (b) the carrier shall provide access to all facts, records and documents relevant to the carriage of goods pursuant to Article 23(6)*”.

3.11 Article 17(6)

A reading of Article 17(6)²⁵⁶ raises a number of questions such as ‘What is the system of apportionment of damage?’ ‘Does this Article consist of an individual stage of its own?’ ‘Who bears the burden of proving the damage percentage?’

²⁵⁶ Article 17(6) provides that: “*When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstances for which it is liable pursuant to this article.*”

‘Which party bears the risk of “unexplained/unknown losses”?’ This section will address these questions.

3.11.1 Concurrent Combination of Losses, One of which is Unexplained

It is important when discussing the apportionment of liability to differentiate between two main types of causes; concurrent causes and competing causes.²⁵⁷ It has been stated that “*Concurrent causes refers to a situation where each event causes part of the damage but none of these events alone was sufficient to cause the entire damage.*”²⁵⁸ For example, where the entire damage was attributed to both the perils of the seas and the unseaworthiness of the vessel. Both causes (unseaworthiness and the perils of the seas) are operative causes in relation to the loss. These types of causes are different from causes which contribute to the total loss, for instance, fire which causes part of the loss and failure to put it out the fire, which causes the rest of the loss. The secondary damage has contributed to the first event to cause the total loss. In the case of competing causes “*the court might have to identify an event or the fault of one party as having caused the entire damage, irrespective of the fault of the other party.*”²⁵⁹ This is, for example, when sensitive cargo that needs special packing and refrigeration; when the packing of cargo was not adequately prepared by the shipper and the carrier did not provide a sound

²⁵⁷ Similar meanings are also explained in Steven, F., ‘Apportionment of damages under the Rotterdam Rules’, (2011) 17 JIML, 343. He explained that: “...*concurrent causation is where each event on its own is insufficient to cause the damage as it occurred, but the combined result of those events gave rise to the damage...competing causation is where several events combine, but each of the events on its own could have caused the entire loss.*”, at p.345.

²⁵⁸ UNCITRAL Doc A/CN.9/544, at para.142. See Stevens, F., ‘Apportionment of damages under the Rotterdam Rules’, (2011) 17 JIML, 343, at p. 345. These types of causes are referred to as ‘additional causes’ by Hart and Honoré, (in Hart H., and Honoré T., *Causation in the law*, (2nd edn, Clarendon Press Oxford, 1985), at pp.205, 207-235).

²⁵⁹ UNCITRAL Doc A/CN.9/544, at para.142.

refrigerated cargo hold, the inadequate packing, as a result, would cause all the loss, even if the refrigeration system of the cargo holds was also inadequate. The improper packing of the cargo would render the cargo a total loss. Similarly, the supplying of inadequately refrigerated cargo hold would also result in the cargo becoming a total loss, even if the cargo had been adequately packed. It is important to mention that all of the examples given by the writer are concerned with concurrent causes.

Under the Hague/Hague-Visby Rules, if the loss or damage was caused by two causes, one of which is unseaworthiness and the other is an excluded peril, e.g. perils of the seas, in order for the carrier to be relieved of part of the liability (i.e. that which was caused by the excluded peril), the carrier should show the exact extent of damage caused by the excluded peril.²⁶⁰ If the carrier fails to prove the exact extent, he will be liable for the entire loss.²⁶¹ The carrier will be responsible for loss that was caused partly by unseaworthiness and partly by unexplainable causes.²⁶² Regarding the Rotterdam Rules, the conclusion in 14th UNCITRAL Session was that the intention of the draft is to grant the courts the task of allocating liability for damage that the carrier is partially responsible for while setting aside that which he is not responsible for.²⁶³ If there are several underlying causes and one or more is unexplained, the court might apply Article

²⁶⁰ *The Torenia* [1983] 2 Lloyd's Rep. 210.

²⁶¹ Margetson N., *The System of Liability of Articles III and IV of the Hague (Visby) Rules* (Paris Legal Publisher, 2008), at p.172; See Steven, F., 'Apportionment of damages under the Rotterdam Rules', (2011) 17 JIML, 343, at p.347.

²⁶² Asariotis R., 'Loss due to a combination of caused' in Thomas, R., *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules*, (Lawtext Publishing Ltd, Witney 2009), 138-168, at p.142-143, citing *Smith Hogg & Co. v Black Sea & Baltic General Insurance Co. Ltd* (1940) 67 Ll. L. Rep 253(HL), also *Transatlantic Marine Claims Agency Inc v M/V OOCL Inspiration (The OOCL Inspiration)* [1998] AMC 1327 (US CA 2nd Circuit), where it was stated that "COGSA's framework thus places the risk of non-explanation for mysterious maritime damage squarely on the [part of the carrier]," at 1330.

²⁶³ UNCITRAL Doc A/CN.9/572, para.74. See Steven, F., 'Apportionment of damages under the Rotterdam Rules', (2011) 17 JIML, 343, at p. 350.

17(6) and render the carrier not liable even if he fails to provide evidence which demonstrate that he exercised due diligence. This can be an escape route for the carrier, as it allows him to withhold evidence and allege that the cause of the loss is unexplained. It must be borne in mind that due diligence to make the ship seaworthy should be exercised at all times. Damages or unexplained losses may be attributed to the carrier's delayed reaction (even where he reacted and exercised due diligence) to replace the missing equipment which, as a result, further extends the amount of damage. Some views were given during the 14th Session to support the approach that the carrier is responsible whereas others disagreed.²⁶⁴ Also, commentators²⁶⁵ who have been involved in drafting the Rotterdam Rules are of the opinion that in cases involving unexplained losses, the carrier will be excused from liability. For instance, after establishing a *prima facie* case, if the carrier proves that the cargo was damaged by one excluded peril but the claimant was not able to establish unseaworthiness under Article 17(5), the carrier will be relieved of all liability. This interpretation is similar to that applied under the Hague/Hague-Visby Rules.²⁶⁶

One may ask how a court will deal with a case where the entire loss was caused by more than two underlying causes; unseaworthiness, an excluded peril and an unexplained loss. Will the carrier or claimant be responsible for the

²⁶⁴ UNCITRAL Doc A/A/CN.9/572, at para. 12 and 30.

²⁶⁵ Sturley, M. et al., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters Legal Ltd, 2010), at para.5.074.

²⁶⁶ E.g., *The Torepo* [2002] 2 Lloyd's Rep. 535, where there were manifestly wrong charts (which on the facts were held not to render the vessel as unseaworthy) and grounding but the causative link was not shown.

extent of the unexplained loss? For example,²⁶⁷ after the incident inspection, it may be shown that the major cause of damage was the unseaworthiness of the vessel (e.g. caused by a crack in the hull) and defective packing also contributed to some extent but the combined effect of defective package and unseaworthiness does not suffice to explain all of the damage. The damage must have been contributed to by another unexplained/unknown cause. If the carrier proved that part of the damaged cargo (e.g. 20 per cent of the total damaged cargo) was caused by the defective packing (pursuant to Article 17(3)(k)), the burden shifts to the claimant (pursuant to Article 17(5)(a)(i)) to prove that some damage (e.g. 60 per cent of the total damaged cargo) was caused by unseaworthiness. However, the rest of the damage (the remaining 20 per cent) is the result of an unknown cause. It is unclear how a court will deal with this type of case; it is most likely that it will relieve the carrier of liability for the damage caused by the unexplained/unknown cause.²⁶⁸ It has been stated that *“as far as the carrier can prove that a part of the loss, damage or delay is not attributable to the events or circumstance for which it is liable, the court should relieve the carrier of that part of its liability. This is true, even if the exact extent of the loss, damage or delay that is not attributable to the events or circumstances is not specified.”*²⁶⁹ Referring again to the same example, what if

²⁶⁷ See Steven, F., ‘Apportionment of damages under the Rotterdam Rules’, (2011) 17 JIML, 343, at p.354.

²⁶⁸ See examples and conclusions given by Stevens, F., ‘Apportionment of damages under the Rotterdam Rules’, (2011) 17 JIML, at p. 343, pp.354-356. Regarding the status of Article 17(6), he stated: *“In our opinion, Article 17.6 does not contain a substantial rule of its own. It does not add any rule of law...from the five previous paragraphs of Article 17. It only serves as an explicit reminder that under the Rotterdam Rules apportionment of liability is clearly an option, and perhaps as an appeal to the courts to be somewhat less stringent with regard to the proof of extent,”* p. 355.

²⁶⁹ Questions and Answers on the Rotterdam Rules by the CMI International Working Group on the Rotterdam Rules, (10.10. 2009); Answer to question 11, *“When there were concurring causes that contributed to the loss, damage or delay, should the carrier who wishes to be partly relieved of its liability prove the extent to which it is liable?”*, at p.14.

the unexplained damage was caused by a defect in the sprinkler of the firefighting system (where this type of damage usually renders the vessel unseaworthy) that had leaked seawater before the crack in the cargo hold gave way and caused 20 per cent of the total damage? What if it was difficult for the claimant to gain access to all the relevant facts that prove the unseaworthiness as a result of the defective fire system, so that he only managed to gain access to facts that lead him to prove unseaworthiness in respect of the crack? Arguably the court must consider the type of difficulties that may face the claimant especially if the carrier did not allow the claimant to gain access to all the relevant facts pursuant to Article 23(6).

3.11.1.1 The Liability under Concurrent Causes where one of the Causes is Unseaworthiness

In order to analyse the apportionment of damage under Article 17(6), it is necessary to outline the multiple stages of the burden of proof under Article 17, as explained above.

First stage: Pursuant to Article 17(1), the claimant has to prove either the loss or the event that caused or contributed to the loss which occurred while the goods were in the carrier's care. Initially, it is required that the claimant prove at which stage the original loss was suffered. If the damage has occurred during the inland carriage (namely, outside the scope of responsibility), then, other inland conventions are more likely to govern the liability.²⁷⁰

²⁷⁰ See Chapter Five: The implication of the multimodal aspect of the Rotterdam Rules on the seaworthiness obligation and the consequent liability.

Reading Article 17(1) on its own (without further addressing the general exclusion of Article 17(2) or the exclusion list of Article 17(3) that excludes the carrier for loss for which he is not responsible), might make one think that there is no issue of causation at this stage nor is there an issue of apportionment.²⁷¹ This statement can be questioned upon a closer reading of paragraph (1). The reference to ‘caused or contributed’ in Article 17(1) should be read to mean that a carrier might be either fully liable, if the claimant was to ‘prove that the loss...or event or circumstance was caused during the period of the carrier’s responsibility,’ or, if the ‘claimant proves that the loss... or the event or circumstances that contributed to it during the period of the carrier’s responsibility’, the carrier, as far as this stage extends, will be liable only for the damage that he is responsible for.²⁷² So, if the claimant proves that part of the loss occurred during carriage and the cause of the rest of the damaged cargo was unexplained, then the carrier will be liable for the entire loss if nothing further is established beyond the claimant’s *prima facie* case.²⁷³ It must be said that the Rotterdam Rules have now made the inland transportation modes applicable.²⁷⁴ Thus, knowing that the sea carrier would not be responsible for any damage that was caused outside the sea carrier’s responsibility, the claim

²⁷¹ Compare Stevens, F., ‘Apportionment of damages under the Rotterdam Rules’, (2011) 17 JIML, at p. 351, where he stated that “*there is no issue of causation at this stage, nor an issue of apportionment.*” Contrast with Sturley, M. et al., (ed.), *The Rotterdam Rules - The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Thomas Reuters Limited, 2010), para.5.063, where they said that: “*the possibility of multiple causation is recognised in Article 17(1) by the provision for events or circumstances that caused or contributed to the loss, damage, or delay.*”

²⁷² See Sturley, M. et al., *The Rotterdam Rules - The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Thomas Reuters Limited, 2010), para.5.054. It was stated that: “*many cases...will be resolved without going beyond the first step [stage].*”

²⁷³ Sturley, M. et al., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Thomson Reuters Legal Limited, 2010), at para. 5.064.

²⁷⁴ See Chapter Five, para. 5.3, at p.336

might be raised for the part of the loss that occurred during the sea carriage and the other part of the loss that was caused during the other carriage modes.²⁷⁵

Second stage: The burden reverts to the carrier to prove in two ways that the cause, or part of the cause, of the damage has not been by virtue of his fault: either (1) by proving that the loss (or part of the loss) was caused by the general defence of Article 17(2) or, (2) 'alternatively' by proving that the loss (or part of the loss) was caused by one of the excepted perils listed in Article 17(3). If the carrier selected the general defence under Article 17(2), in the case of concurrent causes, the carrier has to prove that a particular circumstance or event was one of the causes of the loss and that this event or circumstance was not attributable to its fault.²⁷⁶ However, if the carrier wants to invoke one of the excepted perils under Article 17(3) (for example, perils of the seas), he should demonstrate that the peril has contributed to the loss. It is of prime importance that causation is also demonstrated. A question that has emerged is: 'who has to prove and to what extent do they have to prove that the event or circumstances or the excepted peril have contributed to the loss?'

3.12 The Potential Implicit Burdens that are not mentioned in the Context - Allocation of Responsibility in Cases of Multiple Causation

Article 17(2)-(3) does not explicitly state who has to prove and to what extent that they have to prove the event or circumstances of the excepted peril that contributed to the loss, on which the carrier relies to exclude part of his liability.

²⁷⁵ Sturley, M. et al., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Thomson Reuters Legal Limited, 2010), pp.98-99.

²⁷⁶ See Stevens, F., 'Apportionment of damages under the Rotterdam Rules' (2011) 17 JIML, p.351.

They do not explicitly state either whether this extent has to be considered at the preceding stages (from Article 17(1)-(5)) or only at the final stage of Article 17(6). To this end, the courts in different jurisdictions may arrive at several possible approaches in finding who has the burden of proof; carrier, claimant or both parties. The following section will address these approaches.

3.12.1 Allocating Responsibility between Both Parties depending on the Decision of the Court

The court could follow the approach that the burden of proving the extent of the liability should be connected with the burden of proving what lies with each particular party at a particular stage. A possible interpretation may be that if the carrier, pursuant to Article 17(3) wants to be relieved of all or part of his liability, he has the burden of proving the absence of fault; that the cause or one of the causes of the loss, damage or delay is not attributable to his fault at each stage of claim. Another interpretation could be that if he proves that one or more of the events or circumstances (the excluded perils) caused or contributed to the loss, damage or delay, courts could also impose on the carrier the burden of determining the extent of the loss. Similarly, when the burden is reverted to the claimant, as for example under Article 17(5)(a), the court may impose the burden of determining the extent of the liability on the claimant to prove how much damage the unseaworthiness of the vessel has contributed to the loss.²⁷⁷

The intention of the drafters was to impose on the carrier the proof of fault, in other words, the carrier's initial proof of the cause of the loss. For instance,

²⁷⁷ Sturley, M., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters Legal Limited, 2010), at para.5.055, 5.101.

where an ingress of water has destroyed part or all of the cargo, it is then for the claimant to prove that all or part of the damage is due to the carrier's fault, i.e. unseaworthiness.²⁷⁸

3.12.1.1 The Standard of Proof of the Extent of Liability

It might be sensible to say that the probable causation required by the claimant in Article 17(5)(a) is connected closely to the extent of the loss.²⁷⁹ Thus, the word "probable" in Article 17(5)(a) would be implicitly applied to the extent of liability and thus the standard imposed to ascertain the extent of loss should coincide with the standard of causation imposed on the claimant when proving causation (that the damage was caused by unseaworthiness). In other words, it would not be logical to impose a standard for proving the extent of loss higher than the standard required for 'probable causation'. Otherwise, the Rotterdam Rules do not differ to the Hague/Hague-Visby Rules as regards how much each party is responsible for the damage, even though the drafters of the Rotterdam Rules intended to remove the 'overriding obligation' that has been adopted in some jurisdictions. Common sense dictates that the relevant facts required to prove the 'probable' causation are similar to the facts used to ascertain the extent of damage. If the standard of proving the extent of liability is higher than the standard of proving the probable causation, then the claimant is faced with another problem in discharging the burden of proof under Article 17(5)(a),

²⁷⁸ Sturley, M., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters Legal Limited, 2010), at para.5.072-5.087; Stevens, F., 'Apportionment of damages under the Rotterdam Rules' (2011) 17 JIML, 343, at p.349-351.

²⁷⁹ It might possible to base the apportionment on either the degree of causation or on the degree of fault or negligence. See Hart, H. and Honoré, T., *Causation in the Law*, (Clarendon Oxford, 1985), at pp.205, 207-235.

namely, proving the probable causation (that the damage caused unseaworthiness) and the extent of liability of the loss that was caused by unseaworthiness. Consideration must be given to the problems that still create difficulties for the claimant to prove the actual percentage of loss (i.e. the apportionment of liability).²⁸⁰

The difficulties behind knowing the exact percentage could be solved by the potential obligation required pursuant to Article 23(6).²⁸¹ This requires both parties to cooperate in good faith, including reference to providing access to records and documents relevant to the carriage of the goods.²⁸² Article 23(6) imposes a general obligation on all parties to disclose material information to the other party where there is an actual or apprehended loss of, or damage to, the goods.²⁸³ Such coordination, at least theoretically, should assist the other parties, e.g. the claimant in satisfying its onus of proof.²⁸⁴

3.12.1.2 The Soundness of this Approach

Stevens²⁸⁵ argument that there is no need to impose the entire burden of proof of the extent of damage wholly on the carrier is a logical one.²⁸⁶ First, imposing

²⁸⁰ For example if improper stowage makes the vessel unseaworthy and defective packing combined to produce damage, no expert will be able to calculate and prove that exactly 39.74 per cent of the damage was caused by the improper stowage and exactly 60.26 per cent by the defective packing. See Stevens, F., 'Apportionment of damages under the Rotterdam Rules' (2011) 17 JIML, p.356.

²⁸¹ See para. the suggestion made in the light of Article 23(6), under para. 3.10, Proposed Modification-Solution, at p. 255.

²⁸² See Article 23(6). See WG III (30 June-11 July 2003) A/CN.9/525, para 100.

²⁸³ See above sub-para. 'e- Duty to Facilitate the Taking of Evidence- Article 23(6)', at p. 243

²⁸⁴ See A/CN.9/WG.III/WP.32, p.31. See also WG III (30 June-11 July 2003) A/CN.9/525, para 96.

²⁸⁵ See Stevens, F., 'Apportionment of damages under the Rotterdam Rules' (2011) 17 JIML, 343-359, at p.352-3.

²⁸⁶ Cf. See Tetley, W., *Marine Cargo Claims*, (4th ed., 2008, Blais), p.917. It is also legitimate to say that given the absence of the principle of the burden of proof as regards who is responsible for adducing the evidence of proportion of loss, it would be awkward to see courts impose this

a burden of proof with regard to the extent of loss lies with the party who has the burden of proving facts and causation.²⁸⁷ In the stages (Article 17(2)-(3)), assuming that he also has to prove the extent of the liability, the claimant would have a clear idea about the area that he needs to counter-prove and there would not be any need to re-establish the carrier's liability with regard to the entire loss. Therefore, the difficult part in determining the extent of liability would be initiated by the carrier rather than the claimant.²⁸⁸ For instance,²⁸⁹ if the carrier managed to prove that perils of the seas caused 60 per cent of the damage, he will remain liable for the remaining 40 per cent. Consequently, any counter-measure by the claimant in proving the unseaworthiness, at the stage of Article 17(5)(a), clearly applies only to that part of the damage (60 per cent) for which the carrier might have been relieved of liability in the previous stage (of Article 17(2)-(3)). As a result, proving the extent of the damage is not imposed entirely on the carrier.

Secondly,²⁹⁰ it can also be said that if the burden is entirely borne by the carrier, it might be unrealistic and unfair to render the carrier losing the defence and as a result be fully liable again if the claimant merely proves unseaworthiness, without proving the extent of the carrier's fault that contributed to the damage. It might seem logical to take the approach that each party which has the burden

burden on the part of the cargo-claimant, despite in reality, it would be an impossible effort for the claimant to pursue. See Asariotis, R., 'Burden of proof and allocation of liability for loss due to a combination of causes under the new Rotterdam Rules', (2008) 14 JIML, 537-554, p.548.

²⁸⁷ See Stevens, F., 'Apportionment of damages under the Rotterdam Rules' (2011) 17 JIML, 343-359, at p.352.

²⁸⁸ Since the investigation for evidence to prove unseaworthiness is not made for the entire loss, it is merely made by the carrier who is relying on one of the listed exclusions. For the above example, where the carrier has proved that he is not liable for 70 per cent of the loss, and the cargo-claimant has managed to prove that 30 per cent of the 70 per cent was contributed to by unseaworthiness, the carrier will then only be liable for the remaining 40 per cent.

²⁸⁹ A similar approach to the example was given by Stevens, F., 'Apportionment of damages under the Rotterdam Rules' (2011) 17 JIML, 343-359, at pp.352-353.

²⁹⁰ See Stevens, F., 'Apportionment of damages under the Rotterdam Rules' (2011) 17 JIML, 343-359, at p.352.

of proof should also decide the extent of damage. However, difficulties remain where the carrier has successfully discharged his burden of proof under Article 17(2) or (3), and thus has adduced evidence showing that he should be fully relieved of any liability at this stage. The burden of proof will be very difficult for the cargo-claimant to discharge, focusing on 100 per cent of the claim rather than just 60 per cent as per the above example.

Thirdly, the complex question of apportionment arises where the claimant has difficulty in proving his case. It is quite easily avoided by considering that there is only one legal cause of the loss. This is possible when, together with the inference of the unseaworthiness of the vessel, there is an inference as to the apportionment of liability. In other words, the overall result of the provision seems to make the carrier liable if he cannot prove the extent of the loss, damage or delay caused by a pleaded excepted peril.²⁹¹

3.12.2 The Discretion of the Court without Allocating the Responsibility to One of the Parties

Article 17(6) may be construed in a way that reduces any doubt about the imprecise wording that made reference (inference) to the apportionment of liability from the whole structure of Article 17. Such a paragraph gives the court discretionary power for apportionment: *'or by leaving national courts to determine the different portions of the loss to be attributed to each event or circumstance, depending on the attribution of causation and/or fault for it.'*²⁹² If this approach is followed, due to the lack of guidance on the matter of

²⁹¹ Treitel, G. and Reynolds, F., *Carver on Bills of Lading*, (Sweet & Maxwell, 3rd ed., 2011), para.10.020.

²⁹² Treitel, G. and Reynolds, G., *Carver on Bills of Lading*, (Sweet & Maxwell, 3rd edn, 2011), para.10.022.

apportionment in Article 17 in general and paragraph (6) in particular, courts in various jurisdictions are likely to adopt different approaches.

It can be said that this approach might demand substantial litigation until the desired legal certainty can be achieved. However, this approach is not new and may be followed in many jurisdictions.²⁹³ It has been considered in some jurisdictions²⁹⁴ where, for example, it is used in collision cases and the courts have to determine the apportionment of liability between the two colliding vessels.²⁹⁵ This might indeed be the case for damage that is caused by the mutual faults of the carrier and the cargo-claimant who had jointly contributed to the damage of the cargo. One could consider, for instance, that the claimant shipper, who is the cargo-owner, failed to inform the carrier of the dangerous nature of the cargo. During the voyage, part of the cargo ignited and started a small fire, which normally would have been noticed immediately by the crew and easily extinguished by means of the vessel's firefighting equipment. The crew negligently failed to notice the fire and in addition the firefighting equipment was out of order. As a result, the fire continued to burn and damaged the entire vessel and cargo. It should be possible for the court to find, on the basis of the proof submitted by the carrier and the counter-proof of the shipper

²⁹³ See Asariotis, R., 'Loss due to a combination of causes: burden of proof and commercial risk allocation' cited as Chapter 6 of Thomas, R., *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules*, (Lawtext Publishing Ltd, 2010), p.148.

²⁹⁴ See examples given by Stevens, F., 'Apportionment of damages under the Rotterdam Rules' (2011) 17 JIML, 343-359, at p.348, n.26. In Belgium, the Antwerp Court of Appeal held the carrier four-fifths liable and shipper a one-fifth liable for the damage caused to the cargo of shipper B, in a case where leaking tank containers were improperly stowed on the tween deck of the vessel. CA Antwerp, 19 April 1978, *JPA* 1981-1982, 54. In The Netherlands, the Den Haag Court of Appeal held the carrier and the shipper 50 per cent liable in a case where a cargo of lemons and grapefruits were delivered overripe due to a combination of improper stowage and defective condition of the fruit. (COMMENT: Are these examples given by Stevens – if this is the case make it clear)

²⁹⁵ In some cases, the carrier may only be partially responsible for that event. For example, in collision situations, a 'both-to-blame' collision is not a single event that damaged the cargo on board the carrying vessel. Rather, another relevant event might be that, along with the carrying vessel's failure to keep a proper lookout (now considered as a lack of exercising due diligence to maintain a seaworthy vessel), the other vessel failed to give way.

that the carrier has only proven that the shipper breached his obligation and caused, for example, 60 per cent of the damage.²⁹⁶

It appears that proposals were made to WG III, which did not pursue the matter further, including one imposing a burden of proof on the carrier to determine the extent to which he was not responsible for the loss, damage or delay, where the other imposing party will provide proof but permit apportionment so as to make the carrier 50 per cent liable as a last resort. It was held preferable for the decision to be left for the national courts to make; even though they may not take the same approach.²⁹⁷

3.13 Potential misconception from the imprecise wording

One scholar²⁹⁸ has stated that, because of the imprecise wording, Article 17(5) (the same with Articles 17(2)-(3)) could be read to mean that a court, in its discretion, could apply either one of two consequences - relief of all liability, or relief of part of the carrier's liability - if either one of the two scenarios - sole cause of the loss, or contributory cause of the loss - is proven. This approach is unlikely to be taken by an English court, for three reasons. First, as far as English law is concerned, the carrier is responsible for the whole loss even if an excepted peril is operative, but this has no place under the Rotterdam Rules.²⁹⁹

²⁹⁶ von Ziegler, A., 'Liability of the Carrier for Loss, Damage or Delay' in von Ziegler, A. et al. (eds.), *The Rotterdam Rules 2008*, (Kluwer Law International, New York, 2010), p. 110.

²⁹⁷ See Report of the 14th Session, A/CN.9/572, para. 74. "*The intention of the draft paragraph was to grant courts the responsibility to allocate liability where there existed concurrent causes leading to the loss, damage or delay, some of which the carrier was responsible for and for some of which it was not responsible.*"

²⁹⁸ See Stevens, F., 'Apportionment of damages under the Rotterdam Rules' (2011) 17 JIML, 343-359, at p.351.

²⁹⁹ Berlingieri, F., 'Revisiting the Rotterdam Rules', [2010] L.M.C.L.Q. 583, p. 616. It must be noted that under the current law (Hague/Hague-Visby Rules), the carrier will be liable for the entire damage if he could not manage to determine the exact extend of the damage that he is not responsible for. See the discussion under para. 3.11.1, at p.256.

Secondly, despite the wording being imprecise, the inference seems to be that apportionment at each stage is envisaged; that is, the carrier may be liable only for part of the loss.³⁰⁰ This, of course, relates to situations where there are two or more operative causes to which the Rules attribute different results than under the current system. The decision of finding the carrier liable for part of the entire damage depends upon the extension of loss that is demonstrated by the carrier.³⁰¹ Thus, he will not be exonerated from the entire damage if he could not determine that the loss had been fully caused by the excluded peril. Thirdly, the court is not likely to take the decision of apportionment without referring to the subsequent paragraphs of Article 17(2)-(3) that give the claimant the opportunity of holding the carrier liable for losses caused solely by or contributing to the loss.

3.14 Assessment of Article 17(6): Is it Sensible to regard paragraph (6) as an Individual Stage in Itself?

Paragraph (6) should not be considered as the stage of apportionment if it is being taken on its own for two reasons. First, in Draft WP.56, which presented an earlier form of paragraph (6), it is stated that '*liability must be apportioned on the basis established in the previous paragraphs*.'³⁰² This line has been deleted in the final version. The provision was not to be discussed anymore. The redraft was only to shorten the provision and retain the same meaning.³⁰³ Likewise, this bonds with the idea expressed by a number of delegates that the burden of

³⁰⁰ Treitel, G. and Reynolds, F., *Carver on Bills of Lading*, (Sweet & Maxwell, 3rd ed., 2011), para.10-022.

³⁰¹ Assuming here that the most likely case is that the court is establishing its own rules to determine the apportionment of liability.

³⁰² UNCITRAL Doc A/CN.9/WG.III/WP.56.

³⁰³ UNCITRAL Doc A/CN.9/WG.III/WP.81, fn.50 of p.17.

proof has been clearly detailed at the outset in the paragraphs of Article 17 and that the last paragraph (6) should not be construed as reversing this order of the burden of proof.³⁰⁴ It is clear, therefore, that the apportionment should not be considered to be made at the final stage but only to emphasise the apportionment, during each stage of the burden of proof. Secondly, for the court to establish the allocation issue, they must find that more than one event/circumstance has contributed to the loss/damage/delay and that the carrier is partially responsible for such an event/circumstance. That finding should be made under the framework established by Article 17(1)-(5). Article 17(6) instructs the court to adhere to the same approach when allocating the apportionment of liability and paragraph (6) was intended to be confined to the distribution of loss amongst multiple parties, covering all types of concurring causes.³⁰⁵

3.15 Conclusion

In the Rotterdam Rules, Article 17(1) establishes a *prima facie* presumption for the fault of the carrier if cargo damage occurred during its period of responsibility. Paragraph (2) provides that the carrier is excluded from all or part of his liability if he demonstrates that the cause or one of the causes of the loss, damage or delay was not due to his fault (or the fault of any person for whom he was responsible). This provision can be compared to the catch-all exception in Article IV, r.2(q) of the Hague/Hague-Visby Rules. An alternative route available to the carrier is the common law approach, demonstrating that one of the

³⁰⁴ UNCITRAL Doc A/CN.9/525, pp.18-19, para.52; see also the 2008 Commission Report A/CN.9/572, p.19, para.72.

³⁰⁵ UNCITRAL Working group III, 14th session A/CN.9/572, pp.18-19.

exceptions in paragraph (3) caused or contributed to the loss etc. The most noticeable differences in the list compared to the Hague/Hague-Visby Rules are that the “navigational error” exception has been deleted,³⁰⁶ which in practice places harder demands on the carrier.

One can say that, today, there is no reason for this rule since the carrier is able to keep contact with its crew during the whole voyage. The nautical fault exception is a remnant from older times and while it is still beneficial for carriers, it is nonetheless a provision that cannot be justified in a modern carriage of goods regime. Particularly since the obligation relating to seaworthiness has been made continuous; it would be inconsistent to keep the nautical fault exception.

Paragraph (5) provides that if the claimant demonstrates that the damage/loss/delay was, or was ‘probably’, caused by unseaworthiness and the carrier is unable to demonstrate that that was not the case or that it exercised due diligence as required by Article 14, then the carrier is also held liable. This paragraph puts the burden on the claimant to prove the unseaworthiness and the causation. However, the draftsmen’s attempt to consider the difficulties faced by the claimant may be reflected by adding the word ‘probably’. Even so, this does not ascertain the standard of proof required and it is a matter left for national courts to decide, which will probably vary from one jurisdiction to another. Nonetheless, it is more probable amongst the untested phrases/provisions that the carrier will be given the possibility of not being liable for part of the loss, damage or delay for something that is not within his liability. Thereby, paragraph (6) comes into play when there are concurrent causes.

³⁰⁶ And that the fire exception has been amended to only be applicable in the clear absence of fault by the carrier including persons for whom it is responsible.

Overall, it is constantly stressed in Article 17 that more than one cause of the loss may be involved since the words 'caused or contributed to' are used repeatedly. If that is the case, the Rotterdam Rules provide that the carrier may be liable for the whole or only part of the loss depending on the circumstances.

The burden of proof under Article 17 is left for national courts to construe as regards the *standard of proof* on which the balance may be achieved, and this will surely vary.

CHAPTER FOUR

EFFECT OF SHIPPING STANDARDS ON SEAWORTHINESS

“It is Allah Who has subjected the sea to you, that ships may sail through it by His command, that ye may see of his Bounty, and that ye may be grateful”

(AL-Jathiya, Chapter 45, Verse 12)

Introduction

Laws associated with the carriage of goods by sea have been in existence since ancient times. They have developed from policies, customs and precedents in common law, and have been influenced by cargo-interests and ships' operators. A major part of Carriage of Goods by Sea Law is, for example, the Hague/Hague-Visby Rules,¹ which emerged to regulate the obligations and liabilities of commercial interests to a carriage contract. Shipping Law in general and Carriage of Goods by Sea Law in particular are likely to mutate according to developments within the shipping industry. Such development results from the practice of good seamanship, quality customs, scientific research, and from related organizations etc.,² which make a major contribution in establishing the standards of the shipping industry that are codified in regulations, codes,

¹ Before that there was the Harter Act 1893.

² Numerous groups and associations of non-governmental origin have contributed to the process of developing safety regulations, such as shipbuilders and equipment manufacturers; shipping companies including shipowners, charterers, fleet operators and managers; seafarers; shippers and cargo owners; insurers; classification societies and standard-setting bodies; port authorities; and, navigational aid services. The rise in marine incidents led to extensive research funded by governments, such as the UK Department of Transport, who, in 1988, funded research carried out by the Tavistock Institution. This research resulted in the report *The Human Element in Shipping Casualties* (HMSO, London, 1988) ISBN 0 11 551004 4. This report was then taken to the IMO. In 1992, the House of Lord's Select Committee on Science and Technology, chaired by Lord Carver, issued a report on the *Safety Aspects of Ship Design and Technology*, House of Lord Session 1991-92, HL Paper 30-II and HL Paper 75.

conventions, and so on.³ Such standards are considered by courts when deciding cases⁴ and are used as a yardstick when distinguishing a prudent and diligent carrier from a negligent carrier who did not comply with his obligations e.g. to provide a seaworthy vessel.

Historically, the need to act in response to shipping casualties and to adopt new standards to cope with the thrust of new technologies and developments relevant to vessels and their equipment has caused the shipping industry to experience numerous legal developments, including the Safety of Life at Sea (SOLAS) Convention and the Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention).

As these conventions influence a major part of the shipping industry, they could directly or indirectly affect the carrier's obligation to provide a seaworthy vessel. It would be sensible to consider these conventions, as well as any potential issues that affect both the standard of seaworthiness on the one hand and the carrier's obligation on the other. It is therefore crucial to deal with the industry standards, which may influence a carrier in complying with his obligation to exercise due diligence to provide a seaworthy vessel in accordance with the current Carriage of Goods by Sea Law, i.e. the Hague/Hague-Visby Rules.

4.1 The Relevance and Importance of the Industry Standards

³ Shipping industry can be defined as the rules, regulations and guidance (e.g. conventions, codes etc) issued by official bodies at the international or national level concerned with or interested in the safety of shipping such as the International Maritime Organisation (IMO). See f.n. 12, para. 1.2, at p. 53.

⁴ The shipping industry's instruments (conventions, codes, regulations etc.) set the standard which creates the force behind nearly all of the technical standards and legal rules for safety at sea and prevention of accidents, pollution, loss of life and loss of cargo at sea. See Boisson, P., *Safety at Sea*, (1999, Bureau Veritas), p.137. Cooke, J. et al., *Voyage Charters*, (LLP, 3rd ed., 2007), para. 11.19. The rules, in general, and seaworthiness, in particular, must be judged by the standards and practices of the industry.

Shipowners⁵ have to comply with a number of requirements of the cargo-owner. These requirements are ordinarily set out in the contract of carriage or are part of various statutory regulations. The application of the Hague/Hague-Visby Rules also obliges the shipowner to adhere to certain requirements in order to provide a seaworthy vessel.⁶

The above obligations reflect the common law test of seaworthiness cited in *McFadden v Blue Star Line*,⁷ which stated that, for a vessel to be seaworthy, she “*must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it*”.⁸ In other words, under the Hague/Hague-Visby Rules, the shipowner must exercise due diligence⁹ by applying all of his knowledge and by taking all reasonable measures according to the standards of the industry prevailing at the material time. These standards include requirements relating to the vessel’s manning,¹⁰ equipment,¹¹ supply¹² and, in all aspects, fitness¹³ to encounter perils of the seas.

⁵ The term shipowner is used throughout this chapter in its widest meaning. This includes the bareboat charterer and ship manager, i.e. the sea carrier, but excludes the time or voyage charterer.

⁶ HVR, Article III, r.1, “*The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to: (a) make the ship seaworthy; (b) properly man, equip and supply the ship; (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.*”

⁷ *McFadden v Blue Star Line* [1905] 1 K.B. 697, p 706, per Channel J.

⁸ Also Field J in *Kopitoff v Wilson* (1876) 1 QBD 377, stated that the shipowner should provide a vessel “*fit to meet and undergo the perils of the sea and other incidental risks which of necessity she must be exposed in the course of the voyage,*” p. 380.

⁹ Tetley defined due diligence as a ‘*genuine, competent and reasonable effort of the carrier to fulfil the obligations set out in subparagraph (a), (b) and (c) of Art III (1) of the Hague or Hague-Visby Rules*’. See Tetley, W., *Marine Cargo Claims* (Blais, 4th ed., 2008), p.876.

¹⁰ See *The Roberta* (1938) 60 LI Rep 84, where the court held the ship to be unseaworthy because the shipowners employed an engineer who proved to be incompetent. Also, *The Eurasian Dream* [2002] 1 Lloyd’s Rep 719, where the master’s ignorance of fire hazards, lack of supervision of stevedores and particular characteristics of the firefighting equipment on the ship

4.2 The Potential Legal Implications of the Industry Standards on Seaworthiness

As mentioned above, the law is dynamic and has reasonable flexibility to develop and meet the constant changes of the industry. This illustrates that the legal question of what constitutes the necessary level of seaworthiness and due diligence has changed over time and will continue to change in line with trends of the shipping industry.¹⁴

This is because “[s]eaworthiness must be judged by the standards and practices of the industry at the relevant time, at least so long as those standards and practices are reasonable”.¹⁵

It goes without saying that there are a vast number of regulations governing the industry’s standards and it would be impossible to cover every one of them in

constituted incompetence and consequently rendered the vessel unseaworthy due to improper manning.

¹¹ *Project Asia Line Inc v Shone (The Pride of Donegal)* [2002] 1 Lloyd’s Rep 659, where defects in the generators amounted to a real risk that the ship might have been left without power during the course of the voyage and therefore rendered the vessel unseaworthy; *Haracopos v Mountain* (1934) 49 Ll. L Rep 267, where a defect in the steering gear rendered the vessel unseaworthy.

¹² *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd’s Rep 177, where there was a breach of the exercise of due diligence by providing inadequate bunkers at the commencement of the voyage, which in turn rendered the tug unseaworthy. However, the defendants were protected from liability by an exemption clause. See also *Owners of Cargo Lately Laden on Board the Makedonia v Owners of the Makedonia (The Makedonia)* [1962] 1 Lloyd’s Rep. 316, where contaminated bunker fuel rendered the vessel unseaworthy.

¹³ *The Toledo* [1995] 1 Lloyd’s Rep 40, where damaged plating and deformation of the bracket rendered the vessel unseaworthy; *Southern Sugar & Molasses Co Insurance v Artemis Maritime Co Insurance* [1950] AMC 2054, where loose rivets rendered the vessel unseaworthy; *Huilever SA v The Otho* [1943] AMC 210, where a crack in one of the ship’s hull plates rendered the vessel unseaworthy.

¹⁴ See *Golden Fleece Maritime Inc v ST Shipping and Transport Inc. (The Elli & The Frixos)* [2008] 2 Lloyds Rep 119. Clause 52 of the NYPE form reads “owners warrant that the vessel is in all respects eligible under application conventions, laws and regulations for trading to and from the ports and places specified in Clause 4 of the Charter Party and that she shall have on board for inspection by the authorities all certificates, records, compliance letters and other documents required for such services ... Owners further warrant that the vessel does, and will, fully comply with all applicable convention, law, regulations and ordinances of any international, national, state or local government entity having jurisdiction including ... MARPOL 1973/1978 as amended and extended and SOLAS as amended and extended.” For further information, see the previous chapters.

¹⁵ *Papera Trades Co Ltd and Others v Hyundai Merchant Co Ltd and Another (The Eurasian Dream)* [2002] 1 Lloyd’s Rep. 719, para.127, as per Cresswell J affirming the words of Lord Sumner.

this study.¹⁶ This Chapter will cover some of the international industry standards, which have a direct impact on a vessel's operational standards and may impact upon the obligation of exercising due diligence to provide a seaworthy vessel. In particular, reference will be made to two IMO conventions that are widely adopted and enforced by most of the maritime nations, namely¹⁷:

- The International Convention on Safety of Life at Sea (SOLAS), 1974, as amended¹⁸;
- The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978, as amended.

The first convention sets out rules and regulations that are principally concerned with the strength and fitness of a vessel and the reliability of its machinery and equipment, as well as the management and security of the vessel. The second provides minimum standards for formal qualifications, such as training, certification and watchkeeping capabilities, relevant to the competence of the crew. These conventions aim to promote a culture of safety at sea and improve the standards of the shipping industry, which in turn impacts upon the standard of seaworthiness. In other words, both directly or indirectly relate to the shipowner's/carrier's obligation under the Hague/Hague-Visby Rules to exercise due diligence to provide a seaworthy vessel. This means that the required

¹⁶ Although other regulations contribute to the industry's standards, such as those of classification societies, they generally exclude the ship's operational standards, i.e. manning, crew qualification, equipment management and lifesaving appliances such as lifeboats, life rafts and lifejackets, navigational aids, on-board equipment and navigational equipment such as radar, electronic charts and Gyro.

¹⁷ In Hodges, S., 'The ISM Code and the law of Marine Insurance', p.12, cited in <http://www.nadr.co.uk/articles/published/shipping/ISMMarineInsurance.pdf>. Hodges has affirmed that safety of ships relates to seaworthiness, although it has a specific and precise meaning under maritime law. Still, this particular aspect of safety is regulated primarily by IMO conventions, namely, SOLAS 1974, the Load Lines Convention 1966 and STCW 1978.

¹⁸ For example, certificates required by SOLAS (to be issued by the Flag administrations) include the international tonnage certificate, passenger ship safety certificate, cargo ship safety certificate and load line certificate, etc.

standard of care or due diligence set by law might be assessed by reference to the standards of the industry that prudent shipowners would require to be set for their vessels.¹⁹ For example, if a vessel's construction does not comply with industry standards, such as SOLAS, or if heavy corrosion has resulted in the ingress of water damaging the cargo, then the vessel is rendered unseaworthy.²⁰ It is noted that rules and regulations, such as SOLAS²¹ or STCW, usually set the minimum standards of the industry.²² Yet, for the purposes of the seaworthiness obligation, in certain circumstances, even compliance with these minimum standards may not suffice.

4.3 SOLAS²³

SOLAS requires Flag States to enforce compliance with its minimum safety standards as regards the construction, equipment and day-to-day operations of ships.²⁴ The minimum standards set by SOLAS influence the seaworthiness of the vessel,²⁵ as they apply to the entire construction of the ship and her cargo

¹⁹ See *The Subro Valour* [1995] 1 Lloyd's Rep. 509 at p.516; and the same point in *The Kapitan Sakhrov* [2000] 2 Lloyd's Rep. 255; [2000] C.L.C. 933, where Auld LJ stated "*the test to be objective, namely to be measured by the standards of a reasonable shipowner, taking into account international standards and the particular circumstances of the problem in hand*", p.947.

²⁰ See *The Miss Jay Jay* [1987] 1 Lloyd's Rep. 32 (CA), where a design error, namely, using materials in the design that were unsuitable for the purpose of navigation, was held to have rendered the vessel unseaworthy.

²¹ For example, the purpose of SOLAS is "*to specify minimum standards for the construction, equipment and operation of ships, compatible with their safety.*"

²² The undertaking implied by common law requires that the vessel be seaworthy. There is no implied undertaking that the vessel be a 'safe ship' in English law, though this is probably the case in the US. For American cases, see *The Fiona* [1994] 2 Lloyd's Rep 506; *Woolf v Clagget* [1800] 170 E.R. 607. However, these rules were adopted into English law by the Merchant Shipping (Safety of Navigation) Regulations 2002, SI 2002/1473, as amended by SI 2004/2110.

²³ The generally accepted international regulations, procedures and practices governing ship construction, equipment and seaworthiness required by Article 94 and other provisions of UNCLOS are essentially those contained in SOLAS, the Load Lines Convention and MARPOL.

²⁴ See [http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\),-1974.aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx).

²⁵ Harrison, J., *Making the Law of the Sea: A Study in the Development of International Law*, (Cambridge University Press, 2011), at p.159; Honka, H. 'The standard of the vessel and the

holds.²⁶ Further, SOLAS regulates the technical standards for the construction of the ship, life-saving equipment, radio communications, safety of navigation, carriage of cargoes including hazardous cargoes, safety management on ships, and measures to enhance maritime security.²⁷ The materials used must comply with a particular standard. The vessel should be designed in such a way to withstand the perils of the sea and to deliver the cargo safely and without harm to human life or the sea. Ships should be fitted, in accordance with SOLAS, with adequate detection and protection systems to prevent the outbreak of fire and have a suitable number and type of extinguishers to fight fire.²⁸ Life-saving appliances should be adequate to save the life of the crew in the case of an emergency. Equipment, navigational equipment, spare-parts and the machinery of the ship are no exception; they must be adequate, which requires that there be a spare or stand-by equipment ready to be used at all times, and of the approved type.²⁹

ISM Code' cited as Chapter 4 in Schelin, J., *Modern Law of Charterparties* (Axel Johnson Institute of Maritime and Transport Law, University of Stockholm, 2003), at p.114.

²⁶ See *The Princess Victoria* [1953] 2 Lloyd's Rep. 619. The Court of Appeal, upholding the findings of the lower court, held that the weather, though severe, was not so phenomenal or abnormal as not reasonably to have been foreseen; that the loss was due to the inadequacy of the stern doors and poor design of the clearing ports of the door, and was contributed to by the shifting of cargo stowed on the car deck; that the ship was in consequence unseaworthy in that, by reason of her defects, she was unable to cope with sea perils which should reasonably have been anticipated. In the American case, *The Marine Sulphur Queen* [1973] 1 Lloyd's Rep. 88, the court held that the vessel breached building regulations when converted from a tanker to a sulphur carrier and was therefore unseaworthy. Both cases are cited in Spurin, C. H., *The Law of International Trade and Carriage*, Chapter nine, at p. 34-35. It is important to state that the construction regulations of merchant vessels are extracted from the regulations of SOLAS, the Load Lines Convention and the rules of the classification society of the vessel. See also *Leonard v Leland* (1902) 18 T.L.R. 727, where, during a lifeboat drill, a hook fell off and a davit broke. The plaintiff, the lifeboat and the hook fell into the water. The jury, by reason of the defective hook and davit of the lifeboat, ruled in favour of the plaintiff. The lifeboats, their hooks and davits are nowadays regulated by SOLAS, Regulations 19-20.

²⁷ Harrison, J., *Making the Law of the Sea: A Study in the Development of International Law*, (Cambridge University Press, 2011), at p.159.

²⁸ *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719. Discussed in detail below, see p.283-284

²⁹ SOLAS Chapter III, Regulation 20, sec.5, provides that: "Spares and repair equipment shall be provided for lifesaving appliance and their components which are subject to excessive wear or consumption and need to be replaced regularly." SOLAS, Chapter III, Regulation 7.2, as amended on 6 July 2010 by MSC. 201 (81), provides that: "2.1 A lifejacket complying with the

The above requirements make no difference when comparing SOLAS with the duty to exercise due diligence. The latter demands the effort of a competent and reasonable carrier or any person working for him to provide a safe and seaworthy vessel in order to fulfil the requirements set out in Article III, Rule 1 of the Hague/Hague-Visby Rules.³⁰

Due diligence obliges the shipowner to carry out all reasonable measures in light of the standards of the industry for the purpose of providing a seaworthy vessel and to ensure the safe state of the vessel. In this manner, the safety of shipping is,³¹ at present, governed principally by the international industry standards; i.e. conventions and regulations. SOLAS is therefore one of those standards.

In an American case,³² the Judge indicated that the court is guided by rules, such as SOLAS, to ascertain whether the vessel is seaworthy or not. Thus, all vessels must comply with these regulations and must “*have on board a reliable compass or compasses, sextants and sounding apparatus and be equipped with adequate charts, light books, pilot books, lists of radio beacons, and notices to mariners*”.³³ This quotation emphasises the fact that a vessel might

requirements of paragraph 2.2.1 or 2.2.2 of the Code shall be provided for every person on board the ship and, in addition:

1 for passenger ship on voyage less than 24 h, a number of infant life jackets equal to at least 2.5% of the number of passenger on-board shall be provided”. SOLAS, Chapter III, Regulation 32 requires the carriage of immersion suits which applies to cargo ships over 500GT to carry 10% additional (minimum 2) immersion suits required for people working at remote control stations such as the bridge and engine room.

³⁰ See also, Margetson, N., *The System of Liability of Articles III and IV of the Hague (Visby) Rules* (Zutphen: Uitgeverij Paris, 2008).

³¹ The old phraseology of ‘unseaworthy ship’ as in the old s.457 M.S.A. 1894 has been replaced to a ‘dangerously unsafe ship’ under s.44 M.S.A 1988 in respect of a vessel that is ‘unsafe to go to sea.’ ‘Dangerously unsafe ship’ still applies under the M.S.A 1995. The most recent edition of MSA 1995 has altered all of the above section numbers.

³² *The Southwark* (1903) 191 U.S. at 8-9, 24 S. Ct.

³³ *The Southwark* (1903) 191 U.S. at 8-9, 24 S. Ct. at p.3.

be rendered unseaworthy if she is not equipped with any equipment that is mandatory under SOLAS.

In short, SOLAS aims to provide the minimum standards of the shipping industry as regards technical aspects and the integrity of the vessel's construction, strength, design and the safe carriage of cargo.

4.3.1 Objectives of SOLAS - Construction and Equipment of the Vessel

SOLAS³⁴ sets out industry standards in respect of the vessel's design by laying down technical regulations on the construction and equipping of the vessel in order to prepare her to withstand the perils of the sea to which she will be exposed during navigation. First, SOLAS aims to prevent the structural failure of the vessel; as such, a failure can cause damage to the cargo and/or the sinking of the vessel. Accordingly, each vessel has to be built strong enough to withstand hydrostatic³⁵ and hydrodynamic³⁶ forces. In other words, if a vessel is to be considered seaworthy, she must be tight and strong enough to safely encounter the ordinary actions of the wind and the waves to which she will be exposed.³⁷

Secondly, the stability of the vessel³⁸ varies depending on the loading/unloading operations and the fuel and water distribution in the vessel's holds and

³⁴ The Load Line Convention also sets out similar requirements.

³⁵ Force that is generated from the wind and water sprays.

³⁶ Force of the sea current and waves.

³⁷ *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA (The Torneia)* [1983] 2 Lloyd's Rep. 210; *Demsey & Associates Inc v Steamship Sea Star* [1970] AMC 1088. Hatches should be designed in such a way that they do not obstruct the proper stowage of cargo in tween decks, which would otherwise render the vessel unseaworthy.

³⁸ I.e. the need to keep the ship upright and to withstand heeling and various other stresses.

compartments. Accordingly, SOLAS³⁹ provides regulations that require the captain to have information on the stability of his vessel and distribution of the cargo,⁴⁰ as well as regulations⁴¹ on the importance of how certain cargoes are stowed. However, it is important to bear in mind that even with this type of implemented regulation on a vessel's structure, the cargo, if so badly stowed, will affect the stability of the vessel and consequently render her unseaworthy.⁴²

Thirdly, particular regulations under SOLAS are to be applied to protect the vessel against the occurrence of fire and to extinguish any fire that may break out and cause damage to the vessel or her cargoes. Obviously, such regulations insist that it is important to equip the vessel during the construction process with equipment to detect and fight fires, provided that such equipment is operated by competent, trained crew members. A commentator has stated that "*where the equipment on board a vessel is necessary as a means of locomotion or safety then it obviously has direct implications for the seaworthiness of the vessel*".⁴³

In *The Eurasian Dream*,⁴⁴ the vessel was found to be unseaworthy because, *inter alia*, of an incompetent master. He lacked the requisite knowledge to use the firefighting system on board the vessel and, moreover, his firefighting training was inadequate.

³⁹ Since 1991, the Bulk Cargo (BC) Code has been inserted into Chapter VI of SOLAS.

⁴⁰ SOLAS, Chapter VI, Regulation 8.

⁴¹ SOLAS, Chapter VI, Regulation 7

⁴² *Kopitoff v Wilson* (1876) 1 QBD 377, where iron armour plates were so badly stowed that they rendered the vessel unseaworthy.

⁴³ See Carbett H. Spurin, *The Law of International Trade and Carriage*, Chapter nine, p.33, cited in The National Academy for Dispute Resolution website: <http://www.nadr.co.uk/articles/articles.php?category=4>.

⁴⁴ *Papera Trades Co Ltd and Others v Hyundai Merchant Co Ltd and Another (The Eurasian Dream)* [2002] 1 Lloyd's Rep. 719, per Cresswell J. See also *The Star Sea* [1995] 1 Lloyd's Rep 651, when a fire broke out in the engine room, the master did not know how to operate the CO₂ system to fight the fire. Tuckey J held that the vessel was unseaworthy due to the incompetent master.

SOLAS also regulates the minimum standards in the industry for the construction, equipment and operation of ships including such subdivisions as stability, machinery and electric installations, fire protection and detection systems, and lifesaving appliances.⁴⁵

Questions which inevitably arise include: How efficient are these regulations? Is SOLAS adequate to govern most of the physical and legal aspects of seaworthiness?

The Impact of the Limitation of SOLAS on the Obligation of Due Diligence

If a shipowner has complied with the requirements of SOLAS and those requirements turn out to be inadequate in providing a safe vessel, they are unlikely to prevent an incident of damage caused by unseaworthiness. Similarly, if the SOLAS regulations or their implementation prove to be deficient, despite the fact that the shipowner has complied with them, he will not be taken to have exercised due diligence in providing a seaworthy vessel. This may result even though the inadequacy was a product of the deficiency of the regulations and not of the shipowner's act or omission. In order to illustrate this proposition, it is important to refer to case law.

For instance, in *The Eurasian Dream*,⁴⁶ industry standards, in particular SOLAS, were clearly questioned. In that case, the ship caught fire as a result of stevedores jumpstarting a car's engine (while it was on board the ship) by using fuel in the car's carburettor. The car caught on fire, the fire then spread to the

⁴⁵ Amendments to SOLAS Chapter II-2 and to the International Code for Fire Safety System (FSS Code) to strengthen the fire protection arrangements in relation to cabin balconies on passenger vessels were developed in response to the fire aboard the cruise vessel the *Star Princess*.

⁴⁶ *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719.

entire ship, and the ship and cargo became a constructive total loss. As the crew could not contain the fire, the claimant alleged that the vessel was unseaworthy due to an incompetent master and crew, as well as defective equipment and inadequate documents. The court criticised the competence of the crew and the master, as well as the safety standards of the vessel, in particular the inadequacy of her safety equipment. The court found that the claimant had proved that the loss or damage to the cargo was caused by the unseaworthiness of the ship on the following grounds: (1) the fire would not have broken out if the master and crew had been properly instructed and trained (this was contrary to the discharging operation regulations related to the carriage of vehicles contained in SOLAS)⁴⁷ and there was no proper system i.e. a procedures manual, to give guidance as to the supervision of stevedores⁴⁸; (2) the crew had not been properly instructed, trained and drilled, as it took a long time before the fire alarm was raised and there was a lot of confusion about where the fire was⁴⁹; (3) there was not a sufficient number of walkie-talkies (part of the lifesaving appliances (LSA))⁵⁰ and the fire extinguisher⁵¹ on deck had not

⁴⁷ SOLAS, Regulation 31, entitled, 'protection of cargo spaces other than special category spaces intended for the carriage of motor vehicles with fuel in their tanks for their own propulsion' specifying (a) *fire detection* ... (b) *fire-extinguishing arrangements* ... (c) *Ventilation system* ... (d) *precautions against ignition of flammable vapours*.'

⁴⁸ There was no proper or sufficient procedures' manuals, such as the Safety Management System (SMS), which is now required by the ISM Code. At the time, the ISM Code was not mandatory, as it was not incorporated under SOLAS. It came into operation after the incident of *The Eurasian Dream*. However, the court has emphasised the need to have a system manual on-board a ship. This is equal to SMS. The system of procedures' manuals in *The Eurasian Dream* was too voluminous to be digested and was irrelevant or obsolete; it did not provide for a safe and prudent system. See *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719, pp. 723, 730, 742 and 744.

⁴⁹ SOLAS, Chapter, III, part A - Regulations (7) Development of plans for shipboard, (8) Emergency preparedness, (9) Report and analysis of non-conformities, accident and hazardous occurrences, and (10) Maintenance of the ship and equipment.

⁵⁰ See, SOLAS, Chapter III, entitled, 'Life-saving appliances'.

⁵¹ See SOLAS, Chapter II-2, 'Construction - Fire protection, fire detection and fire extinction'.

been properly serviced, which is contrary to SOLAS.⁵² SOLAS had set out the minimum amount of safety equipment to be placed on board and it was essential for the carrier to comply with its provisions. The court stated that “*In accordance with SOLAS, fire-fighting instructions and procedures in particular should have been concentrated in one concise and clear manual, catering specifically for Eurasian Dream. The master himself complained of the fact that he had not been given such a manual. Univan should have provided the vessel with clear checklists of the essential actions to be taken in the event of fire: (a) at sea and (b) in port.*”⁵³

However, the court also found that even if the ship had been in compliance with all SOLAS provisions, i.e. by having the minimum number of walkie-talkies (four sets) on board, the ship would still have been rendered unseaworthy.⁵⁴ This gives a clear indication that compliance with SOLAS safety standards does not guarantee compliance with the requisite safety standards that arise when exercising due diligence before and at the beginning of the voyage under the Hague/Hague-Visby Rules.⁵⁵

This proposition was also confirmed as regards the breathing apparatus. SOLAS sets the minimum number of breathing apparatus as part of the fire-fighting appliances required on board all ships. For a ship the size of the

⁵² The court held that the fire could have been controlled if proper firefighting training and procedures had been in place. The carrier had therefore breached Article III, r.1 and could not rely on the fire defence under Article IV, 2(b) of the Hague/Hague-Visby Rules.

⁵³ *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719, at p.743-744, per Cresswell J.

⁵⁴ *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719, at p.744, per Cresswell J.

⁵⁵ *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719, Cresswell J stated that: “(1) *The vessel was not supplied with an adequate number of functioning walkie-talkies. (a) The vessel had (at most) only four walkie-talkies. It was usual during bunkering operations for the bunkering team to take three of the walkie-talkies. This left only one walkie-talkie. The officer on duty (if he had that walkie-talkie with him) had no means of communicating with the master, chief officer or duty A/B. (b) There should have been a sufficient number of walkie-talkies so that at all times there was one each in the possession of the master, chief officer and the other deck officers and all members of the crew engaged in supervising discharge (in addition to the three required for bunkering)*” at p. 742.

Eurasian Dream, SOLAS requires two breathing apparatus sets to be on board. However, the court agreed with the recommendation of the expert witness that compliance with the minimum safety standard set by SOLAS was not sufficient to operate the ship safely. It was stated that “*two sets of breathing apparatus were not sufficient for this particular vessel (although two represented the minimum number required by SOLAS)*”.⁵⁶ In terms of being fit to encounter emergencies, e.g. fire, the same experts have recommended that “*four breathing apparatus sets are normally carried on a vessel such as this [the Eurasian Dream]*”,⁵⁷ as the sufficient number that would not render the vessel unseaworthy, at least as far as the breathing apparatus were concerned. The *Eurasian Dream* complied with the minimum number of breathing apparatus sets. This might be right, on the basis that SOLAS recommends only the minimum amount of safety equipment, and the standard of safety provided by SOLAS should not be considered as one size fits all.

The *Kapitan Sakhrov*⁵⁸ is another case which confirms that shipping industry Codes, which are incorporated into SOLAS, do not guarantee the fulfilment of the seaworthiness obligation. In this case, a container stuffed with undeclared dangerous cargo was loaded on deck. The owner of the cargo had failed to indicate the dangerous nature of the cargo. At the same time, the carrier had loaded a highly flammable cargo that produced a dangerous vapour inside a tank container. This type of cargo required ventilation to extract the dangerous vapour in order to avoid the risk of explosion. The carrier, however, had stowed the flammable cargo below deck with no means of ventilation. As a result of the

⁵⁶ *Ibid.* The court had agreed to the common ground between expert witnesses, at pp.729 and 742.

⁵⁷ *Ibid.* at p.732.

⁵⁸ *The Kapitan Sakhrov* [2000] 2 Lloyd's Rep. 255.

high temperature during the voyage through the Arabian Gulf, the undeclared dangerous cargo on deck exploded, causing a fire that subsequently spread to the flammable dangerous cargo below deck, which ultimately resulted in the sinking of the ship. The Court of Appeal held that stowage of flammable dangerous cargo below deck rendered the ship unseaworthy and thus the owner had failed to exercise due diligence in making the vessel seaworthy before and at the beginning of the voyage. This was found to be in breach of SOLAS Chapter VII, Regulation 6.3, IMDG Code⁵⁹ Regulation 5, and MOPOG, the Russian Code for the carriage of dangerous goods equivalent to the IMDG Code, confirms the same provision. Those regulations require that cargo which gives off dangerous vapours be stowed in a well-ventilated space. The carrier recovered his losses arising from the initial explosion caused by the undeclared cargo but the shipowner did not recover the other claims against him by the dependants of the two deceased seamen; by other shippers for loss of their cargo; and, by the Iranian authorities for pollution damage. The court in this case indicated that compliance or otherwise with codes⁶⁰ like MOPOG was not necessarily determinative of the exercise of due diligence before and at the beginning of the voyage⁶¹ and “a reasonable misconception or misunderstanding of such an instrument may not amount to want of due diligence.”⁶² However, the unreasonable conduct of stowing the dangerous cargo in the wrong location, e.g. under deck without ventilation, will render the vessel unseaworthy because “it should have been obvious to the shipowner and

⁵⁹ International Maritime Dangerous Goods (IMDG) Code, which is now mandatory under SOLAS Chapter VII. The IMDG Code is a uniform international code for the transport of dangerous goods by sea covering such matters as packing, container traffic and stowage, with particular reference to the segregation of incompatible substances.

⁶⁰ The reference to ‘codes’ should be considered to cover shipping industry codes in general.

⁶¹ *The Kapitan Sakharov* [2000] 2 Lloyd’s Rep. 255, at p.268

⁶² *Ibid*, at p.268

experienced seamen that such cargo should not be stowed in a confined spaces unless it was well ventilated."⁶³ On this ground, the judges held that the shipowner had failed to exercised due diligence.

The above two cases demonstrate that SOLAS or other shipping industry codes are not necessarily fully determinative of seaworthiness. It should be remembered that SOLAS does not provide exact numbers for sufficient safety equipment. For example, cargo ships are recommended to comply with "*The minimum number of firemen's outfits* [e.g. two outfits]"⁶⁴ but this is only a recommendation. Further, SOLAS allows the carrier some discretion in deciding on the amount of safety equipment for each particular ship.⁶⁵ The carrier and his crew should exercise their seamanship knowledge in order to ascertain the sufficient amount of safety equipment that makes the ship seaworthy according to the Hague/Hague-Visby Rules.

What can a shipowner do to overcome the inefficiencies of SOLAS?

Mere compliance with industry standards, i.e. SOLAS, is not conclusive evidence of the carrier having exercised due diligence, nor is it sufficient proof

⁶³ *Ibid*, at p.268. It was further held that: "Given the potential scale of the catastrophe if, as a result of a breach of MOPOG, vapour from isopentane stored below deck in unventilated conditions catches fire, I can see no ground for sparing the ship's officers from a finding of a lack of due diligence merely because they had done their honest but incompetent best to understand what MOPOG and the technical certificate required or permitted them to do," at p. 276.

⁶⁴ SOLAS, Chapter II, Regulation 32: 'Maintenance of fire patrols, etc., and provision for fire-extinguishing equipment', paragraph (m).

⁶⁵ SOLAS, Chapter II, Regulation 32(i), reads that: "(iii) ... there shall be at least two such extinguishers in each such spaces"; Chapter II, Regulation 14(b) reads that "(ii) A self-contained breathing apparatus which shall be capable of functioning for a period of time to be determined by the Administration"; Regulation 63 provides that: "The system [cargo pump room system] shall use water-spray or another suitable medium satisfactory to the administration."

of the vessel's physical seaworthiness.⁶⁶ A carrier needs to determine his vessel's seaworthiness by assessing the standard of due diligence at all times and not merely by relying on meeting industry regulations or recommendations, such as SOLAS. He should draw on the inherent specialised knowledge that he possesses or ought to possess as regards the fitness of his vessel and by doing so,⁶⁷ will know the standard of care necessary to fulfil the obligation of due diligence and avoid bringing about damage caused by unseaworthiness. "*The standard of seaworthiness must rise with improved knowledge of shipbuilding and navigation*",⁶⁸ which is not fully embraced by SOLAS. That is to say, relying exclusively on shipping regulations, such as SOLAS, to determine the standard of due diligence is the wrong approach.⁶⁹ Those regulations, especially technical ones such as those involving firefighting equipment,⁷⁰ mostly evolve

⁶⁶ In *Transpetrol Maritime Services Ltd v SJB (Marine Energy) (The Rowan)* [2012] 1 Lloyd's Rep 564 (CA), Longmore LJ said that he saw "*considerable force in Mr Kendrick's argument on the construction of the unamended clause 18 of the Vitol terms. If the judge were right, an owner would find himself in breach of the clause, if any fact existed which would cause the approval letters to be amended or withdrawn whether or not he knew of that fact and whether or not he had had any opportunity to put right the defect which would have caused the letters to be amended or withdrawn. That is a very far reaching warranty which would indeed cut across the warranty of seaworthiness in the Asbatankvoy form. The only way to avoid that conclusion would be to treat clause 18 as a warranty in relation to documentation; not a warranty as to the underlying condition of the vessel*", at para.24.

⁶⁷ Knowledge that is known exclusively by the carrier/shipowner, such as the stability of the vessel. See *Onega Shipping & Chartering BV v JSC Arcadia Shipping (The SOCOL 3)* [2010] EWHC 777. The improper stowage of cargo had affected the vessel's overall stability on departure from the last load port in Finland. This was an aspect that only the chief officer and master would have known about, not the charterers. Mr Justice Hamblen found that there had been a failure on the part of the master and chief officer to supervise the cargo stowage properly with the ship's stability and ultimate seaworthiness in mind. See also Donaghy, T. 'There goes the deck cargo', *Maritime Risk International* (12 November 2010).

⁶⁸ *Burges v Wickam* (1863) 3 B. & S. 669, at p.693, per Blackburn J.

⁶⁹ It is important to note that the private sector plays, nowadays, an important role in the enhancement of the safety and seaworthiness of vessels. The International Chamber of Shipping, for example, issues recommendations to reinforce precautionary measures during loading or discharging operations. See 'Long Campaign' Lloyd's List, 7 September 1995. As does the international Cargo Handling Coordination Association (ICHCA) to ensure proper performance of operations. See 'Pressure grows for action on overloading/discharging practices', *International Bulk Journal*, December 1994, 99-101. See also, 'Figures hide why bulk carrier sinkings are still a problem', Lloyd's List, 14 August 1992.

⁷⁰ Horrocks, C., 'Challenges Facing the Shipping Industry in the 21st Century', Sixth Annual Cadwallader Memorial Lecture (15 September 2003), at p.3.

from reactions⁷¹ to maritime incidents rather than proactive steps by advanced research and are therefore effectively amendments to the regulations. The Shipping Industry needs to undertake a long-term, comprehensive review with a view to ensuring that regulations embrace all future challenges associated with applicable new technologies, the human element, the needs of the maritime industry and the expectations of society. Without the Industry doing so, by simply following the basic industry standards, a shipowner may quite possibly exercise a lower standard of due diligence.

In fact, SOLAS recommends that the carrier ascertains the requisite amount of safety equipment to ensure that they are sufficient in number and are accessible at all times, having regard to the type of the ship and the nature of the trade on which the ship is employed.⁷² Each of the shipping industry codes, e.g. ISM Code, *“is a system used daily which is actually growing and developing through a process of continual improvement”*.⁷³ Continual improvement can be achieved by an on-going obligation.⁷⁴ The shipowner by continuously exercising due diligence can achieve two things. First, he would be able to identify the ‘risk’ of unseaworthiness that may be caused by, for example, an insufficient amount

⁷¹ For example, the origin of the ISM Code was a reaction from representatives of the UK during the 15th session of the IMO in November 1987. They requested that the IMO immediately investigate designs to improve the safety of roll-on/roll-off ferries. The Secretary of the General International Chamber of Shipping stated: *“It is often said that advances in the technical regulation of shipping tend to follow a casualty - that the maritime sector responds to, rather than anticipates its problems.”* Horrocks, C., ‘Challenges Facing the Shipping Industry in the 21st Century’, Sixth Annual Cadwallader Memorial Lecture (15 September 2003), at pp. 3-4.

⁷² SOLAS, Chapter II, Regulation 52(b); Regulation 47(a) reads: *“The ship, whether new or existing, shall at all times when at sea, or in port be so manned or equipped as to ensure that any initial fire alarm is immediately received by a responsible member of the crew.”*

⁷³ Anderson, P., *ISM Code: A Practical Guide to the Legal Insurance Implications* (2nd ed., 2005), Chapter One, para. 1.1.

⁷⁴ *Glory Maritime Co, Swedish Management Co. SA v Al Sagr National Insurance Co. (The Nancy)* [2013] EWHC 2116 (Comm). Mr Justice Blair confirmed the expert statement that the ISM Code and shipping regulations ‘cannot be compared with a technical standard for the condition of a vessel’, para.212. Blair J stated that: *“the implementation of the ISM Code is a complex one, involving interpreting the code itself, and taking account of various procedural requirements that are published from time to time [even after the ship sails], and (potentially) an assessment of the audits of the safety management system, and audits of the vessel.”* para.212.

of safety equipment. Secondly, he will rectify any shortage that has arisen by mere compliance with the minimum amount of equipment required by the industry regulations, e.g. SOLAS. As a result, the carrier will be 'establishing safeguards' that avoid loss or damage from that unseaworthiness.

4.4 STCW Convention

It became clear to the IMO that the problems of safety and crew unseaworthiness occur mostly as a result of human error.⁷⁵ It is often said that a good crew makes a good ship. Therefore, the IMO and ILO united to produce guidance consisting of recommendations on the training and education of seafarers.⁷⁶ The IMO⁷⁷ has established the first convention on standards for seafarers, namely, the International Convention on Standards, Training, Certification and Watchkeeping for Seafarers (STCW). The STCW Code⁷⁸ is divided into two parts. Part A contains compulsory requirements consisting of the minimum standard of training required for seafarers to gain their certification.⁷⁹ Part B consists of recommendations and measures to guide parties when implementing the Convention. Furthermore, certain recommendations contained in Part B will be transferred in due course to Part A

⁷⁵ James C., 'Human Element in Maritime Safety & Marine Pollution Prevention', (1996) Tenth Chua Chor Teck Annual Memorial Lecture, Singapore January 1996. "*While statistical analyses suggest that around 80% of all shipping accidents are caused by human error, the underlying truth is that the act or omission of a human being plays some part in virtually every accident, including those where structural or equipment failure may be the immediate cause.*", p.2. See also, Anderson, P., *ISM Code: A Practical Guide to the Legal Insurance Implications* (LLP, 2nd ed., 2005), p.15.

⁷⁶ See the joint study between IMO and ILO, Guidelines on the medical examinations of seafarers, (ILO, 2013). The ILO and IMO agreed to create a joint working group to develop revised guidelines of the STCW Convention, p.8

⁷⁷ In 17 July 1978.

⁷⁸ The regulations contained in the STCW Convention are supported by sections in the STCW Code. Generally speaking, the Convention contains basic requirements which are then enlarged upon and explained in the Code.

⁷⁹ For example, Chapter II deals with standards regarding the master and deck department.

if they become compulsory.⁸⁰ The STCW Convention⁸¹ has established global minimum professional standards of competence for seafarers. It sets out responsibilities which are placed upon the shipowner⁸² to ensure that all of his seafarers, pursuant to their rank, are educated and trained in order to be granted certification by marine schools and institutions. As discussed in the previous Chapter (see para.1.4.3), manning is one aspect of a vessel's seaworthiness. Seafarers on board a vessel must be competent. They must hold the necessary certificates that are required by relevant regulations and as far as the UK is concerned, these regulations give effect to the STCW Convention.⁸³ Therefore, seafarers must be adequately trained and qualified to execute their tasks and be able to communicate sufficiently using one working language. Additionally, refresher training as well as renewal of certificates are to be carried out regularly in compliance with the STCW Convention, as amended.

⁸⁰ See, Ziarati, R., 'Innovation in Maritime Education and Training', (last visited 17.9.2014) cited in http://www.egmdss.com/pictures/press/2010_10_01_cn_IMLA2010_innovation_in_maritime_education_and_training.pdf. Resource Management and Engine-room Resources Management principles that were part of Part B-section VIII/2 have been transferred to Part A-section VIII/2 of the STCW Code since they have been made compulsory, at para. 2.6. The Flag State must provide IMO with information on how it intends to give legal effect to the provisions of the Convention. This includes information on the training courses to be provided, examinations and intended assessments for certification.

⁸¹ It must be noted that basic relevant qualifications and minimum manning requirements may be laid down in the legislation of the Flag State and/or possible relevant trade union agreements. It may include ILO Convention No. 147, the Merchant Shipping (Minimum Standards) Convention 1976, and make it by the language of the ISM Code a requirement of Flag States to incorporate it into their national legislation minimum requirements in respect of criteria such as safe manning standards, hours of work, seafarers' competency and social security.

⁸² Responsibilities such as record keeping, shipboard familiarisation of crew, ability of the crew to co-ordinate their activities and minimum rest periods. See IMO website <http://www.imo.org/OurWork/HumanElement/TrainingCertification/Pages/STCW-Convention.aspx> (last visited 17.9.2014). Part A of the STCW Code is mandatory. The minimum standards of competence required for seagoing personnel are given in detail in a series of tables. Chapter II of the STCW Convention, for example, deals with standards regarding the master and deck department.

⁸³ Merchant Shipping (Training and Certifications) Regulations 1997, SI 1997/348, as amended by SI 1997/1911; Merchant Shipping (Master's Licences and Hours, Manning and Training) Regulations 1993, SI 1993/1213, as amended by SI 2003/3049.

Further, IMO needs to approve the public or private marine institutions,⁸⁴ which issue the required certificates.⁸⁵

The fact that the crewmembers of a vessel hold the required certificates of competence issued by a reputable marine institution does not automatically mean that they are competent. There is still the possibility that they might be regarded as incompetent due to a lack of knowledge or training on specific issues, in spite of holding a valid certificate.⁸⁶

A question which inevitably arises in light of crew seaworthiness is whether these regulations are sufficient to govern the minimum industry standards in order to reflect the adequate standard of due diligence required by a shipowner in light of the crew's competence. Or alternatively, is the STCW Convention sufficient as a minimum industry standard to govern the manning aspects of seaworthiness?

The following section will demonstrate the inadequate implementation of the STCW Convention; the inadequate regulations of the STCW Convention; and, the problem of the safety manning certificate in relation to crew fatigue.

⁸⁴ Scope and objectives of the training in the institution must meet the requirements of STCW regulation II/1. See, IMO, 'Maritime training institutions approved by Member States', (visited 17.9.2014) cited in <http://www.imo.org/OurWork/HumanElement/TrainingCertification/Pages/MaritimeTrainingInstitutes.aspx>.

⁸⁵ IMO has issued a 'White List' with the countries assessed and found to be implementing the revised STCW Convention (STCW 95) properly. The 1978 STCW Convention responded to concerns relating to developing countries. Due to limited and poor infrastructure of marine institutions in some countries, the Convention allowed seafarers to acquire experience while serving on board a vessel at sea after periods spent in teaching. As far as the UK is concerned, the Maritime and Coastguard Agency (MCA) is the relevant governmental department that provides approval to nautical colleges and marine institutions to issue the required certificates of competency.

⁸⁶ An example of this can be seen in *The Star Sea* [1995] 1 Lloyd's Rep 651.

4.4.1 Inadequate Implementation of the STCW Convention - A Factor Requiring different in practical sense Due Diligence in Employing the Crew

Despite the guidance given in the STCW Convention, it is regarded as the minimum practice of the industry in respect of manning vessels.⁸⁷ Yet, some factors within the Convention prevent the achievement of that minimum standard and diminish it from the standard required of a diligent shipowner; the result being an unseaworthy vessel with incompetent personnel. Therefore, these factors require the shipowner to raise his due diligence standards in order to avoid unseaworthiness.⁸⁸ A factor such as self-evaluation by the Flag State in complying with the STCW Convention will consequently affect the standard of the crew's competency. For example, IMO requires countries to provide it with information on how the provisions of the STCW Convention will be implemented in their domestic system. This includes supervision training, the assessment of all training institutions and the awarding of certificates, which must be carried out to a certain quality standard.⁸⁹ All of the documents provided by the State are subject to assessment. However, the communicated information might not reflect the reality of a lower standard of training or a fault in the certification

⁸⁷ Bachxevanis, K., "Crew negligence" and "crew incompetence": their distinction and its consequence', JIML 16 (2010), 128.

⁸⁸ The author is of the opinion that industry standards would be improved if the IMO's mandatory audit scheme were in place. However, the IMO Assembly has agreed a programme to make this scheme mandatory, with the entry into force of the mandatory audit scheme likely to be in 2015.

⁸⁹ 'Cooperation make it happen', *Seatrade Review* (March 1997), 65.

scheme of the State.⁹⁰ The result could be the supply of an incompetent crew because the Convention was not implemented in good faith.⁹¹

It may be argued that a more competent crew would have been supplied if the industry had complied with the STCW Code evaluated and verified by IMO itself.⁹² The correctness of information and the adequacy of the issued certificates would have been properly checked.⁹³

Due diligence of a shipowner in a situation similar to the above would not be limited to recruiting ship's personnel with recognised shipping certificates under the STCW Convention. The STCW certificate that is granted to the crew may not be conclusive as to the actual educational standard of the crew as required by the industry. A new standard of due diligence is required and it should not be limited to the assessment of a seafarer's certification pursuant to the STCW standard. This problem was highlighted in *The Eurasian Dream*.⁹⁴ The Court held that the master, chief officer and the chief engineer, who were from the same labour-supplying State and possessed the necessary certificates of

⁹⁰ It is impossible for IMO to have authority to enforce its regulations in each Member State. This is due to the limited resources of IMO. Also, it is impossible politically. Most governments would never agree to ships flying their Flags being boarded by a team of IMO inspectors. See the IMO website at www.imo.org/About/Pages/FAQs.aspx (last visited on 17.9.2014).

⁹¹ In *The Patraikos 2* [2002] 4 SLR 232, the claimant's expert investigation concluded that "[the officer in question] was not the person who sat for the third mate's examination. Indeed, he [the expert] thought that the signature on the application form for the third mate's certificate was not Orlanda's [the officer in question], neither was the photograph. Consequently, Orlanda did not hold a third mate's certificate when he served on-board the vessel" and the qualification of the officer was highly questionable, at p.248.

⁹² 'Labour supplies face STCW deadline', Lloyd's List (28 April 1998). This will have the effect of stopping the supply of underqualified and therefore incompetent officers to the maritime sector.

⁹³ All documents submitted by Member States have to be analysed by a group appointed by the Secretary-General and approved by the MSC. Following such an examination, the group will issue a report stating which State has or has not been capable of showing that they are applying the standards of the Convention. The IMO will then decide which States have met their obligations and place them on the "White List". This means that a certificate issued by a State on the list must be recognised by other parties to the STCW Convention.

⁹⁴ *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719.

competence, were incompetent for, *inter alia*, “receiving improper or inadequate training in firefighting”.⁹⁵

It is submitted that particular diligence should be exercised by a shipowner when a person is appointed for a job in the first place, especially from a labour-supplying State that has an unknown or doubtful status in terms of training.⁹⁶ However, the standard of due diligence should be heightened, to a greater or lesser extent, according to the standard of marine schools in the labour-supplying State, in order to embrace a new test similar to the one that was given to the person who applied to the marine school from which he/she received his/her certificate.⁹⁷

The test as to whether a seafarer has been supplied from a nation with dubious implementation procedures is an objective one. The test is “Would a reasonably prudent owner, knowing the relevant facts of the standard of the marine school, have allowed this vessel to put to sea with this seafarer?”⁹⁸

Therefore, in exercising due diligence, an owner appointing a new crewmember on his ship must take the following steps. First, regarding technical competence,

⁹⁵ *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719, p.743, per Cresswell J, “Moreover the crew were not drilled or otherwise instructed in the following: (i) responding to firefighting during cargo operations; (ii) checking and shutting gas tight doors; (iii) deploying CO₂ on the decks...” It should be emphasised that the shipowners were ignorant of the fact that the master lacked particular knowledge of the vessel and there was also a lack of general training in the firefighting department.

⁹⁶ Some Flag States have no establishments for nautical or engineering education or training and their supply of certificated and qualified personnel comes from the major shipping nations, which keep colleges and training centres operating largely at the expense of their own taxpayers. Sass, C. A. ‘Seaworthiness Factors’, a paper delivered for ‘Fitness for Sea’, an international conference on seaworthiness at Newcastle University (9-10, September 1980), p.67.

⁹⁷ “Would a fully competent (prudent) person be able to discover the problem and resolve it? If the answer was yes and the engineer, for example, acted in the same way as a prudent person would act, then he is competent, but if he did not act in the same way then he is not”, *The Roberta* (1938) 60 Ll. L. Rep. 84, p.86, per Greer LJ.

⁹⁸ *The Hong Kong Fir* [1961] 1 Lloyd's Rep. 159, p.168, per Salmon J; *A. P. Stephen v Scottish Boatowners Mutual Insurance Association (The Talisman)* [1989] 1 Lloyd's Rep. 535, p.539, per Lord Keith of Kinkel, “The test is an objective one, directed to ascertaining what an ordinarily competent fishing boat skipper might reasonably be expected to do in the same circumstances”.

the owner should demand the appropriate certificate of competency and other training certificates in order to check whether the officer has the required qualifications to work on board the shipowner's vessel. An officer of the watch and a deck officer are required: 1) to undertake training involving college time and sea time in order to achieve the Watch Certificate of Competence (CoC);⁹⁹ 2) to pursue STCW 95 basic safety training courses such as, personal survival techniques, fire prevention and firefighting, elementary first aid and personal safety and social responsibilities and to hold appropriate medical certificates.¹⁰⁰ It is not enough that the crewmember has the relevant certificate required by the law of the Flag State,¹⁰¹ as certificates are not conclusive proof of competence. An officer of the watch can be qualified by holding the required certificates but not competent to work on a particular vessel.¹⁰² For instance, an officer who is qualified and holds the correct certificate of competence cannot work on a particular ship, e.g. a tanker, unless he has carried out training, both at a marine college and on board a tanker, in order to allow him to work on that specific type of ship.¹⁰³ Accordingly, the carrier should secondly inquire about his crewing

⁹⁹ In accordance with Ch. II and Ch. VIII of the STCW Convention.

¹⁰⁰ In accordance with Ch. V, VI and VII of the STCW Convention. See also, MCA notes; Marine Information Note (MIN) 469 (M).

¹⁰¹ There is no consistency as regards training requirements among States; see *The Makedonia* [1962] 1 Lloyd's Rep. 316, p.336; *Cosmopolitan Shipping Co v Hatton & Cookson* (1929) 35 Ll. L. R. 117, p.121.

¹⁰² Lack of training or unfamiliarity with a particular type of vessel will render the officer incompetent. See Bachxevanis, K., 'The distinction between 'crew negligence' and 'crew incompetence' and the consequence thereof', cited at p.3 of the ReedSmith website, http://www.ukpandi.com/fileadmin/uploads/uk-pi/Documents/Legal_sources/ReedSmith_Crew_NegligenceVsIncompetence_Nov2011.pdf.

¹⁰³ See, e.g. Regulation V/1, which provides that: "Officers and rating assigned specific duties and responsibilities related to cargo or cargo equipment on takers shall have completed an approved shore-based firefighting course in addition to the training by Regulation VI/1 and shall have completed:

1. at least three months of approved seagoing service on takers in order to acquire adequate knowledge of safe operational practices; or
2. an approved tanker familiarization course covering at least the syllabus given for that course in section A-V/1 of the STCW Code."

experience and should also examine his seaman's book.¹⁰⁴ Thirdly, the crewmember's character should be properly examined by the carrier, as allowed by the length and nature of the interview.¹⁰⁵ Fourthly, all of the above should be further explored and verified by taking up references of the interviewee and, in particular, by consulting his/her previous employers,¹⁰⁶ even if this necessitates the vessel's sailing to be delayed by a couple of days.¹⁰⁷ If information from the previous employer is sufficient and correct for the shipowner to rely on, then the new recruit can be appointed and the owner may be said to have discharged his due diligence obligation.¹⁰⁸ If not, the shipowner must have a satisfactory system of procedures¹⁰⁹ to show that a crewmember has received adequate training from the marine institute.¹¹⁰ For instance, in *The Patraikos 2*,¹¹¹ the court decided that the second officer, in spite of holding the requisite STCW certificates, was nevertheless incompetent. The Judge stated that "[T]he second officer was poorly trained at the [marine institute] in seamanship and/or radar observation. Without contrary evidence from the defendants, I accept the testimony of [claimant's expert] that the institute provides sub-standard education in marine and nautical engineering and

¹⁰⁴ *The Makedonia* [1962] 1 Lloyd's Rep. 316, p.336.

¹⁰⁵ *Thames & Mersey Ins Co. v The "Gunford" Shipping Co.* [1911] A.C. 529, p.541 per Lord Shaw, cited in Clarke, M., *Aspects of the Hague Rules: a comparative study in English and French Law*, (Martinus Nijhoff publishers, 1976), p.216.

¹⁰⁶ *The Makedonia* [1962] 1 Lloyd's Rep. 316, at p.336. It was stated that: "A man ... may hold certificates of competency and yet have a disabling lack of will and inclination to use his skill and knowledge so that they are well-nigh useless to him", p.335, per Hewson J.

¹⁰⁷ *The Hong Kong Fir* [1961] 1 Lloyd's Rep. 159, p.169.

¹⁰⁸ *The Makedonia* [1962] 1 Lloyd's Rep. 316, p.337; *Moore v Lunn* (1922) 2 Ll. L. R. 86, p.93.

¹⁰⁹ See <http://www.mcga.gov.uk/c4mca/mcga07-home/workingatsea/mcga-trainingandcert/ds-stc-usefulcontacts/ds-stc-externalorgs-colleges.htm>.

¹¹⁰ In the UK, the MCA is responsible for assessing the standard of the marine colleges within the jurisdiction. If a marine college is not approved by the MCA, then that college will not be able to issue certificates of competence. A list of approved marine colleges is available on the MCA website at <http://www.mcga.gov.uk/c4mca/mcga07-home/workingatsea/mcga-trainingandcert/ds-stc-usefulcontacts/ds-stc-externalorgs-colleges.htm>.

¹¹¹ *The Patraikos 2* [2002] 4 SLR 232 (Singapore High Court, Admiralty Division).

*produces inferior graduates.*¹¹² One may ask whether it is practical to obtain information about a particular crewmember or training institution, or alternatively, how the court in *The Patraikos 2* was informed of the poor training at the relevant marine institute and whether such information is readily available.

Defendants (and perhaps claimants) may prove their case by providing the court with information, regarding the certificates of a crewmember, which was obtained at the time of recruitment. The information should show that the crewmember was trained to the minimum required standard under the STCW Convention. Such information is also easily accessible through the 'Direct access to certificate verification database' that is maintained by STCW State Parties.¹¹³ This database provides information regarding certificates and endorsements and allows for their validity to be checked online. A claimant, in order to prove his case, can appoint an experienced expert to investigate the matter and provide his opinion in court. The claimant in *The Patraikos 2* provided factual evidence to support his allegation of a breach of the Hague Rules. The evidence arose from the expert investigation that found out what had actually happened prior to the incident that resulted in the loss.¹¹⁴ The expert brought an important piece of evidence to court and importantly "*visited the Philippines in the course of his investigation and made inquiries ... of: (1) the Professional Regulation Commission; (2) Philippine Overseas Employment Administration (3) Philippine Maritime Institute (PMI); (4) the Maritime Industry Authority; (5) Philippine Seafarers Training and Review Center*".¹¹⁵ The

¹¹² *The Patraikos 2* [2002] 4 SLR 232, p.271.

¹¹³ Parties interested in verifying certificates and their information can do so by utilising the database provided on the IMO website at <http://www.imo.org/OurWork/HumanElement/Training/Certification/Pages/CertificateVerification.aspx>.

¹¹⁴ *The Patraikos 2* [2002] 4 SLR 232, at p.238.

¹¹⁵ *The Patraikos 2* [2002] 4 SLR 232, at p.245.

investigation proved the poor standards of training at the relevant marine institute. The expert was “*unimpressed by the standards and facilities of the PMI ... there was [inter alia] a shortage of teaching staff.*”¹¹⁶ The investigation indicated that the officer of the watch was incompetent and that the defendants failed to exercise due diligence in checking his background, training and qualifications. It follows that the court would expect to see details of the owner’s/carrier’s procedures and system, such as the Safety Management System required by the ISM Code, for recruiting a new member of the crew. Such a system should not only include details of the vetting of prospective crew members or officers in terms of their certification, relevant experience and due diligence in order to be discharged, but also procedures for the vetting of manning agencies and/or marine schools.

a) The Role of the ISM Code on the Developed Aspect of the Manning Obligation

As discussed previously, the manning of a vessel is an essential part of exercising due diligence in providing a seaworthy vessel. Developing technology and sophistication of vessels creates the need for crewmembers with specialist knowledge. In this respect, the owner needs to ensure the engagement of a properly qualified, adequately trained and competent crew. Paragraph 6 of the ISM Code has organised this process by requiring the shipowner/carrier to arrange a procedure which must be implemented during the recruitment and assessment of the certification, competency and past experience of all officers and crew. This procedure must be applied to the

¹¹⁶ *The Patraikos 2* [2002] 4 SLR 232, at p.246.

previous employer and the certificate-issuing institutions.¹¹⁷ Further, this procedure needs to be adhered to, not only by the shipowner, but also by the recruiting agency and the shipping management company. Part A, paragraph 6 of the ISM Code reads:

“6 RESOURCES AND PERSONNEL

6.1 The Company should ensure that the master is:

1. properly qualified for command;
2. fully conversant with the Company’s safety management system; and
3. given the necessary support so the master’s duties can be safely performed.

6.2 The Company should ensure that each ship is manned with qualified, certificated and medically fit seafarers in accordance with national and international requirements.

6.3 The Company should establish procedures to ensure that new personnel and personnel transferred to new assignments related to safety and protection of the environment are given proper familiarization with their duties.

Instructions which are essential to be provided prior to sailing should be identified, documented and given.

6.4 The Company should ensure that all personnel involved in the Company’s safety management system have an adequate understanding of relevant rules, regulations, codes and guidelines.

6.5 The Company should establish and maintain procedures for identifying any training which may be required in support of the safety management system and ensure that such training is provided for all personnel concerned.

6.6 The Company should establish procedures by which the ship’s personnel receive relevant information on the safety management system in a working language or languages understood by them.

6.7 The Company should ensure that the ship’s personnel are able to communicate effectively in the execution of their duties related to the safety management system.”

¹¹⁷ As far as the UK is concerned, the Maritime and Coastguard Agency (MCA) is the authority responsible for the assessment and certification of master and crew certificates. See <https://mcanet.mcga.gov.uk/public/coc-2007-2/index.asp> (last visited on 17.9.2014).

In fulfilment of Paragraph 6 of the ISM Code, a diligent owner/carrier needs to constantly deal with and take remedial action for various emerging shortcomings concerning existing personnel. Diligence is first a question of adequate supervision. Second, there must be a satisfactory system of communication within the structure of the organisation. Not only should the carrier know his crew but he should also ensure that the crew and officers receive technical information and training necessary to maintain requisite levels of competency.¹¹⁸ This suggests that the obligation to provide an adequate and competent crew should be continued for the entire contract period and it is not enough to satisfy the obligation merely at the outset. The shipowner should not be excused from liability by simply asserting that he had exercised due diligence before and at the commencement of the voyage, especially where circumstances between the recruitment of the crew and the material voyage have changed.¹¹⁹ For instance, training that might have been considered to be adequate before and at the beginning of the voyage, may be classed as insufficient in light of later developments and emerging circumstances that require the crew to have further training during the same contract period. Accordingly, as Anderson suggests, “*the safety management system may have to be modified to take into account the new risk.*”¹²⁰ For this reason, the latest amendment to the ISM Code, i.e. paragraph 1.2.2.2, is now imposing the duty to carry out risk assessments.¹²¹

¹¹⁸ *The Lady Gwendolen* [1965] 1 Lloyd's Rep. 335; *The Farrandoc* [1967] 2 Lloyd's Rep. 276; *Papera Traders Co Ltd and Others v Hyundai Merchant Marine Co. Ltd and Another (The Eurasian Dream)* [2002] 1 Lloyd's Rep. 719.

¹¹⁹ According to Article III r.1 of the Hague/Hague-Visby Rules.

¹²⁰ Anderson, P., *ISM Code: A practical guide to the legal and insurance implications*, (LLP, 2005), Ch. 5, case study on 'The Toledo' case.

¹²¹ Paragraph. 1.2.2.2 of the ISM Code. “*Assess all identified risks to its ships, personnel and environment and establish appropriate safeguards.*” This amendment entered into force on 1st

b) The Impact of Risk Assessment on the Manning of the Vessel

As part of the exercise of due diligence in providing a seaworthy vessel, it is essential to have on board a competent¹²² and efficient¹²³ crew. The recent revised amendment¹²⁴ of the ISM Code, paragraph 1.2.2.2, is intended to develop a new general standard of due diligence with a particular focus on manning. This means that a shipowner is now required to carry out risk assessments in order to maximise the effectiveness of the implementation of the ISM Code. He should therefore also assess the human element as regards safety by carrying out a risk assessment. The Code seeks to promote and impose a culture of continuous improvement of manning safety by ensuring that working conditions do not prevent the crew from working within the set of rules and regulations that are required to keep the vessel seaworthy throughout the period of the voyage. Implementation of the Code should also reveal whether the crew break the general safety rules, and if they do, the situation must be corrected. It is worth mentioning that risk assessments will be essential in light of exercising due diligence, as it promotes the concept of providing further training, i.e. non-statutory training which some shipowners consider expensive

July 2010, which made risk assessments a mandatory building block of any Safety Management System (SMS).

¹²² For example, *The Star Sea* [1995] 1 Lloyd's Rep. 651, where Tuckey J held that the vessel was unseaworthy, as the master was incompetent.

¹²³ The crew on-board a vessel must be adequate in number. Most maritime nations have regulations governing the manning of vessels sailing under their Flag. In the UK, manning requirements are governed by Merchant Shipping (Safe Manning, Hours of Work and Watchkeeping) Regulations 1997, SI 1997/1320.

¹²⁴ Amendments to the ISM Code were adopted through Resolution MSC. 273 (85) on 4 December 2008, and entered into force on 1 July 2010. Section 1.2.2.2 was amended to replace the old words that read "1.2.2 Safety management objectives of the Company should, inter alia ... 2. establish safeguards against all identified risks" to "1.2.2 Safety management objectives of the Company should, inter alia... 2 assess all identified risks to its ships, personnel and the environment and establish appropriate safeguards."

and unnecessary. Such training, however, can be seen as an important feature for the development and improvement of the due diligence standard.

4.4.2 Inadequate Regulations of the STCW Convention relating to Crew Fatigue

Fatigue has long been a major factor that has contributed to human error and resulted in accidents.¹²⁵ It is a biological state to which all individuals are susceptible, regardless of skill, knowledge, competence or training. The type of operations on board vessels demands constant attention and alertness. As such, fatigue has a direct impact on the safety of operations. The STCW Convention amendment¹²⁶ sought to address the problem of crew fatigue by regulating minimum rest periods. This was introduced in order to ensure that crew members had an adequate amount of rest (calculated in hours) and were able to operate the vessel safely. Under the STCW Convention, every seafarer is allocated a watch or part of a watch. The crew must receive a minimum of 10 hours rest in every 24-hour period. The rest period may be divided into two parts, provided that one part is at least six hours long. Though the STCW Convention 1995 seems to provide effective regulations and guidance, issues such as training drills,¹²⁷ emergencies and economic factors, in addition to the

¹²⁵ Moore, W., 'Managing Fatigue', Human Element Alert Bulletin 5 (January, 2005), cited at www.he-alert.org. See also, Manadaraka, A. *Modern Maritime Law and Risk Management* (1st ed., 2008), para. 3.2.2.

¹²⁶ S. A-VIII/1 (Mandatory) and s. B-VIII/1 (guidance) of the STCW Code. The ILO Merchant Shipping (Minimum Standards) Convention 1976, No. 147, is also relevant.

¹²⁷ Section 1.3 of the ISPS Code reads that: "*In order to achieve its objectives, this Code embodies a number of functional requirements. These include, but are not limited to ... (6) requiring ship and port facility security plans based upon security assessments and (7) requiring training, drills and exercises to ensure familiarity with security plans and procedures*". This section of the ISPS Code requires that vessels must carry out drills and have documented security plans. Such requirements were often perceived as placing additional and unreasonable demands on the crew; see, Smith, A., 'Adequate crewing and seafarer's fatigue: the

consistent reduction in crewing levels,¹²⁸ means that the STCW regulations can be interpreted flexibly, thereby having a direct effect on rest periods and crew fatigue.¹²⁹ For instance, on short sea voyages, intense workloads are required from the vessel's crew. This, combined with misuse of the exception provision of the Convention as regards rest periods for "*emergency, drill or in other overriding operational conditions*", could easily result in crew fatigue and a subsequent accident.¹³⁰

Under the Convention, there is room for the hours of rest requirement to be manipulated thereby rendering the provision on rest periods ineffective,¹³¹ as illustrated by the example below.

- **Example**

A vessel had a short port stay of 24 hours only, carrying out continuous cargo operations with intense workload on the crew. There was no time for rest or recovery before the beginning of the voyage. After the commencement of the voyage an officer either fell asleep or due to impaired judgement as a result of acute fatigue, the vessel was involved in an accident (grounding or collision). Such temporary incapacity (fatigue) may be held sufficient to render the

international perspective', a study made for the Center for Occupational and Health Psychology (Cardiff University) cited in <http://www.sindacatomarittimi.eu/media/documenti/83.pdf>. It was stated that "*additional burdens on seafarers were found to include: extra paperwork, ISPS drills and longer working hours*", at p.12. It has been reported that: "In the past you could probably just get on with your job but now you have got all this extra paperwork to tell you how to do your job", see Smith, A., 'Adequate Crewing and Seafarer's Fatigue', <http://www.sindacatomarittimi.eu/media/documenti/83.pdf>, at p. 12.

¹²⁸ Crewing levels have changed over the last few decades. Thirty years ago many large commercial vessels went to sea with a crew of 40 persons. Today, much larger vessels often have a crew of half that number and crews of less than 10 are common on smaller ships.

¹²⁹ After the incident of *The Antari*, where the Chief Officer fell asleep during the navigating watch, the IMO has been criticised by the UK Marine Accident Investigation Branch (MAIB) Report for reacting too slowly in addressing the problem of fatigue-related incidents. See, 'Grounding Leads to IMO Warning', (April, 2009), 23(3) *Maritime Risk Assessment* 14.

¹³⁰ Section A-VIII/1 of the STCW Convention.

¹³¹ The MAIB Bridge Watch-keeping Safety Study (2004) has concluded that the current provisions of STCW 95 in respect of safe manning, hours of work and look-out are not effective and creates a risk factor in collision and grounding.

seaman incompetent and, as it was in existence at the commencement of the voyage, the vessel departed in an unseaworthy condition.¹³² This did, of course, result in an inquiry as to the owner's/carrier's exercise of due diligence to prevent such fatigue occurring. In this example, it is likely that the owner/carrier would be held to have failed to discharge his due diligence obligation.

Although there has been no case law on this matter,¹³³ it has been argued that a court may find that lack of adequate rest had rendered the vessel unseaworthy because of an incompetent or a temporarily incompetent crew.¹³⁴ This would undoubtedly be true if the obligation of seaworthiness is extended to cover the entire voyage (which is not the case under the current law). However, this problem may be solved by the extension of the obligation of seaworthiness. Given that the extension of the obligation would render the carrier liable for unseaworthiness as a result of crew fatigue, the carrier would not, in theory, allow the working hours of the crew to exceed a limit that is likely to cause crew fatigue and consequent incompetence of the crew, in spite of the flexibility under the STCW Convention.¹³⁵

4.4.3 Safety Manning Certificates and Crew Fatigue

¹³² See White R, '*The human factor in unseaworthiness claims*', (1995) L.M.C.L.Q. 221-238, p.228.

¹³³ Anderson suggests that: "They are being settled amicably out of court or, occasionally, are reaching a private arbitration hearing", Anderson P., 'Fatigue and ISM', (Feb-2007) *Seaways*, 7-10, p.10.

¹³⁴ Bachxevanis, K., 'Crew Negligence and Crew Incompetence: their distinction and its consequence', (2010) 16 JIML, 102.

¹³⁵ The extension of the obligation as a solution is explained in more details under para 4.6.1, at p.313.

The necessary crewing level of a vessel is defined by the vessel's Safe Manning Certificate,¹³⁶ which sets out the minimum number of crew required¹³⁷ to safely manage all operations of the vessel. This certificate, in practice, is more widely known as the 'Minimum Safe Manning Certificate' and this arguably indicates that the practice adopted by Flag States, along with owners/operators, shows a tendency to follow what is only the legal minimum requirement. The criteria used to determine a vessel's minimum crew complement is her size, type and area of work¹³⁸ but not her age. However, a vessel that has been subjected to the perils of the sea and ensuing wear and tear may require more maintenance and repairs than a new vessel. This certainly increases the workload of seafarers.¹³⁹ Therefore, the vessel might be unseaworthy for being under-manned regardless of what the minimum manning certificate may say, especially if her cargo and navigational operations cannot be executed by her crew while receiving adequate rest to avoid fatigue. If not, the minimum number is not sufficient to execute the vessel's operations safely.

When deciding on the safe number of crew that a vessel needs, the shipowner should not limit his observance to the Safe Manning Certificate,¹⁴⁰ the provisions of the STCW Convention, the opinion of the vessel's builders or the

¹³⁶ The 'Safe Manning Certificate' is a document issued in the case of a UK-flagged vessel, by the Secretary of the State, and in the case of other vessels, by or on behalf of the government of the State whose flag the vessel is entitled to fly. This Certificate lists the numbers and grades of the personnel required to be carried by the vessel. Regulation 5(1) of the Merchant Shipping (Safe Manning, Hours of Work and Watchkeeping) Regulations 1997.

¹³⁷ Undermanning renders the vessel unseaworthy. See *Forshaw v Chabert* (1821) 3 Br & B 158.

¹³⁸ SOLAS, Reg. 13 which merely provides that all ships must be "*sufficiently and efficiently manned*" and this is left for the Flag States to regulate. For UK-flagged vessels, see Merchant Shipping (Safe Manning, Hours of Work and Watchkeeping) Regulations 1997.

¹³⁹ It is interesting to note that the newly built *Emma Maersk*, the world's largest container vessel with a capacity of TEU 11,000-13,500 and a GT of 170,000, has a minimum safe manning document requiring a complement of just 13 crew members. See Smith, A., 'Adequate Crewing and Seafarer's Fatigue: The International Perspective', cited at <http://www.crew2crew.com/ForumAttachments/b173972d-6b53-4b50-b7c1->, at p.10.

¹⁴⁰ Annex C of MSN 1767 contains guidance tables showing appropriate manning levels. Bear in mind that this consists of a minimum manning level.

vessel's previous owners.¹⁴¹ The shipowner must also closely monitor the management of the crew's hours of rest and hours of work, and assess them against the criteria set out by the STCW Convention in order to confirm that the various operations can be performed safely without prejudicing the rest period requirement. The prevention of fatigue should parallel the efforts of the shipowner in exercising due diligence and making the vessel seaworthy.¹⁴²

4.5 General Problems

The following problems may occur generally in relation to the effectiveness of the shipping industry's regulations, codes and conventions.

4.5.1 Matters that Reduce the Effectiveness of the Industry

The standard of international shipping is currently governed by a tripartite agreement.¹⁴³ The industry standard is adopted by IMO, applied by shipowners and carriers, and imposed or policed by State Parties; for example, by Flag or Port States. As such, the implementation of the IMO's conventions and regulations, such as SOLAS, is left entirely to States, which means that the standard of applying those conventions and regulations varies, which in turn potentially results in the reduction of the effectiveness of such instruments. This reduction must be considered as negatively affecting the carrier's obligation to provide a seaworthy vessel. However, a tighter new regulation, for example, a

¹⁴¹ *The Hong Kong Fir* [1961] 1 Lloyd's Rep. 159, pp.168-169.

¹⁴² Operational tasks must not be performed by people who are too tired to perform them safely and procedures should be in place to ensure that fatigue does not occur. See Anderson, P., "Fatigue and ISM", (Feb- 2007), *Seaways*, 7-10, p.8.

¹⁴³ O'Neil, W., 'Raising world maritime standards', cited as Chapter 21 in Legate, H. et al., *International Maritime Transport Perspectives* (2005, Routledge), p.292.

regulation imposing a requirement to fit recent technologically innovative instruments or machineries under SOLAS, is not normally the sole solution to raise the standard of seaworthiness or to increase the obligation of due diligence. For example, a new recent regulation came into force¹⁴⁴ in respect of bulk carriers, obliging them to be fitted with high level alarms and level monitoring instrumentation¹⁴⁵ that will provide an early warning of water ingress into the cargo hold should a crack develop in the ship's hull. Essentially, this means that the shipowner will be notified at an early stage and will be able to take action to stop any water from damaging cargo in the cargo holds, which would in turn prevent him from being liable under a related unseaworthiness claim. However, it is submitted that, in practice, sound regulations will improve the industry's standards and will affect (directly or indirectly) the standard of a vessel's seaworthiness only if there is proper enforcement of those regulations. The IMO should be given the authority to verify that Flag States carry out proper, conscious and adequate implementation of the regulations by shipowners/carriers and maritime training institutions.

Therefore, even after the adoption of perfect new regulations, vessels are susceptible to cargo damage due to one or more of the following: a poorly equipped, inadequately maintained, inadequately repaired or unskillfully operated vessel. This, essentially, would mean that the carrier, notwithstanding the perfect new regulations, has not exercised due care or due diligence.

¹⁴⁴ The Committee adopted amendments to Chapter XII (Additional Safety Measures for Bulk carrier) of SOLAS, as amended, to require the fitting of high level alarms and level monitoring systems on all bulk carriers, in order to detect water ingress from 1 July 2004.

¹⁴⁵ Water ingress monitoring is not a new concept. The daily monitoring of bilge and tanks is part of good seamanship since antiquity. However, this method of monitoring does not provide continuous information. Further, when the weather deteriorates, the manual process is usually suspended because of the dangers to crew members taking the sounding.

Adequate implementation of regulations would, as a matter of public interest, improve shipping industry standards and reduce malpractice. Effective implementation of rules and policing of the shipping industry would mean that those shipowners who are in breach of regulations would, in fact, be in breach of their seaworthiness obligation. The industry standards “*form a basic standard from which the court works*”¹⁴⁶ and the cargo-claimant would seek to privately implement them through private court actions seeking damages for suffered losses, even when such regulations are not properly implemented by the authorities and are in practice ineffective.¹⁴⁷

As an interim conclusion, although the standard of due diligence might be increased if developments in the standards of the shipping industry are achieved, along with necessary changes to the current system, the IMO needs the authority to verify that Flag States actually implement the conventions fully and properly. A case in point is the so-called ‘white list’ of Parties deemed to be giving full and complete effect to the revised STCW Convention’s provisions.¹⁴⁸ Port State Control inspectors are expected to be increasingly targeting ships flying Flags of countries that are not on the ‘white list’.¹⁴⁹ The ‘white list’ principle

¹⁴⁶ See Clarke, M., *Aspects of the Hague Rules*, (Martinus Nijhoff-The Hague, 1976), p. 224. Clarke refers to classification societies, which are not covered in this study.

¹⁴⁷ By effective policing in the port of sailing, unscrupulous shipowners will be detected by the State and then required, under a judicial or an administrative intervention, to comply with any violated regulations. In terms of enforcement at the port of destination, the risk of being caught might encourage a self-conscious shipowner, who does not want his entry into the port delayed or withheld or to face detention of his vessel, to comply with the regulations. This fear should make the shipowner more diligent in complying with regulations that are related to the obligation of seaworthiness.

¹⁴⁸ The White List was published by IMO following the 73rd session of the Organization’s Maritime Safety Committee (MSC), meeting from 27 November to 6 December 2000. Cited on IMO website: <http://www.imo.org/OurWork/HumanElement/TrainingCertification/Pages/STCW-Convention.aspx> (last visited 18.9.2014).

¹⁴⁹ Cited on IMO website: <http://www.imo.org/OurWork/HumanElement/TrainingCertification/Pages/STCW-Convention.aspx> (last visited 18.9.2014).

should be applied to other conventions. Also, “there should be a provision for sanctions and penalties which may be applied if convention requirements are not adhered to. Furthermore, an audit system is needed whereby a Member’s performance can be properly monitored.”¹⁵⁰ It should be noted that SOLAS limits the extent of the inspections. It prescribes “*Port State control inspections are normally limited to checking certificates and documents. But if certificates are not valid or if there are clear grounds for believing that the condition of the ship or its equipment, or crew, does not substantially meet the requirements of a relevant instrument, a more detailed inspection may be carried out.*”¹⁵¹

4.5.2 Inadequate Response to Maritime Safety and Seaworthiness

Although the container safety standards may not always be adequate or up-to-date, their implementation as compulsory rules may nevertheless be effective to increase standards of safety and seaworthiness.

In other words, the standards of safety and seaworthiness might, even where inadequate, be, to some extent, increased by the proper implementation of the relevant regulations if effective and proper implementation is made compulsory.

For instance, radar equipment on board of ships is considered as an important aid of navigation that contributes to safe navigation.¹⁵² However, a survey¹⁵³ has shown that a high percentage of shipowners are not willing to fit radars onto

¹⁵⁰ Speech by W. O’Neil (Former Secretary-General of the IMO), ‘Raising world standards in the maritime industry - the IMO perspective’, at the International Maritime Policy Conference, (London, 13 May 2003). Cited on http://www.imo.org/blast/mainframe.asp?topic_id=762&doc_id=2953 (last visited 18.9.2014).

¹⁵¹ SOLAS, Chapter XI, Regulation 4.

¹⁵² IMO, ‘The Compulsory Fitting of Seaborne Radar Collision Avoidance Systems: A Discussion’, (1980) *Journal of Navigation*, 33, pp.389-397, at p.390.

¹⁵³ General Council of British Shipping (1977) *Input-Output Inquiry 1974*, General Council of British Shipping: London (unpublished).

their vessels because fitting radar equipment was not compulsory until 1982.¹⁵⁴

This shows that regulations are not always adequate and is indicative of how shipowners are content to merely meet their minimum responsibilities, according to the compulsory shipping industry regulations, when providing a seaworthy vessel.¹⁵⁵ By making the implementation of up-to-date safety regulations, such as radar fitting on board ships, compulsory, the carrier will be obliged to fit the necessary radars. By doing so, fewer accidents should be expected. This is to say that regulations which are not adequate, e.g. where up-to-date regulations are merely recommendations and therefore optional,¹⁵⁶ their implementation as compulsory rules will increase the safety standard that affects the obligation to exercise due diligence to provide a seaworthy vessel.

Consequently, what can be done to improve the current situation and reduce malpractice regarding shipping standards?

4.6 Solutions

4.6.1 Extending the Obligation of Due Diligence to Cover the Entire Voyage - A Way to Reduce Gaps Created by Industry Standards

¹⁵⁴ IMO, 'The Compulsory Fitting of Seaborne Radar Collision Avoidance Systems: A Discussion', (1980) *Journal of Navigation*, 33, pp.389-397. Carrying radar on tanker ships has been made compulsory in 1982 and made progressively after ward to different ships from 1984-1989. Carrying radar equipment is now compulsory under SOLAS Ch. V, Reg. 19/2.8.

¹⁵⁵ Ropner, W., 'Promoting High Standards at Sea - The Shipowners' Contribution', a paper delivered in *Fitness at Sea - The International Conference on Seaworthiness* (1980) organised by Newcastle University, p.44.

¹⁵⁶ See below f.n. 173, in regards to carrying radar equipment, e.g. *President of India v Coast S.S. Co. (S.S. Portland Trader)* 213 F. Supp 352 at pp.356-357; 1963 AMC 649 at p.654; [1963] 2 Lloyd's Rep. 278 at p.281 (D. Ore. 1962)

Since the introduction of the Hague/Hague-Visby Rules, there have been tremendous technological developments with regard to electronic aids and navigation. New methods of performing contracts of carriage have become possible. Thus, “*the standard of due diligence required from the carrier gets higher and higher everyday*”.¹⁵⁷ It is debatable whether due diligence requires the shipowner of an older vessel to upgrade its machinery and equipment in order to satisfy the existing standards of seaworthiness. A shipowner cannot be expected to constantly keep up with all of the latest expensive advanced technology. However, the shipowner is to some extent required to furnish his vessel with certain recent technical developments. The requirement of a ‘reasonable shipowner’ in preparing or providing a seaworthy vessel is determined objectively, so that it can change over time¹⁵⁸ and in line with technological developments.¹⁵⁹ Further, it has been argued that the shipowner is obliged to implement new technology that affects the seaworthiness of the vessel, if it is directly related to the shipping industry.¹⁶⁰ This is the case with the International Safety Management (ISM) Code, which has become mandatory.¹⁶¹ Ignorance of the provisions of IMO Conventions, ISM, SOLAS, MARPOL, and so on, may point to a shipowner’s lack of due diligence in relation to the safe operation of his vessel, which might result in unseaworthiness.¹⁶² Having said that, there has been judicial reluctance to include the development of machinery and equipment as part of the shipowner’s due diligence obligation in providing a

¹⁵⁷ Karan, H., *The Carrier’s Liability under International Maritime Conventions The Hague, Hague-Visby, and Hamburg Rules* (Edwin Mellen Press, 2005), p.282.

¹⁵⁸ Ping-fat, S., *Carrier’s Liability under the Hague, Hague-Visby Rules* (Kluwer Law, 2002), p.60.

¹⁵⁹ See Astle, W. E., *Shipping and the Law* (Fairplay Publication, 1980), p.87.

¹⁶⁰ Aladwani, T., ‘Effect of Shipping Standards on Seaworthiness’, (2011) EJCCL 33, at p.36.

¹⁶¹ Tetley, W., *Admiralty Law*, p.84; Ping-fat, S/., *Carrier’s Liability under the Hague, Hague-Visby and Hamburg Rules*, (Kluwer Law International, 2002), p.60.

¹⁶² Ping-fat, S., *Carrier’s Liability under the Hague, Hague-Visby Rules*, p.60.

seaworthy vessel,¹⁶³ provided that those technological advances are not yet standard for a particular vessel or carriage. Nonetheless, an obligation on the shipowner to provide a seaworthy vessel under the current obligation of seaworthiness, accompanied by a clause similar to Clause 52 of the Shelltime charterparty,¹⁶⁴ would put the shipowner at risk of breaching his due diligence obligation. This clause requires a shipowner to exercise all practicable precautions, i.e., to modify or fit new equipment according to shipping industry rules, in order to bring his vessel in line with the recently developed standards of the industry. For example, *The Elli and The Frixos*,¹⁶⁵ a recent case concerning MARPOL, illustrates that a shipowner must modernise his vessel to meet the latest amendments to industry standards. The owner of two oil tankers, *The Elli* and *The Frixos*, time-chartered the vessels on the Shelltime 4 form. The tankers were described as 'double sided'. After approximately 20 months, and before the end of the charter period, new MARPOL Regulations 13F, 13G and 13H came into force, which required all oil tankers to have the relevant documents relating to the physical condition of the vessel in order to carry heavy grade oil cargo. Vessels should be fitted with double bottoms or double sides, extending along the total length of the cargo tanks. The double bottom tanks of *The Elli* and *The Frixos* did not run the entire length of the cargo tanks. Instead, bunker tanks protected the last two tanks (slops tanks) rather than the

¹⁶³ *President of India v West Coast Steamship Company (The Portland Trader)* [1964] 2 Lloyd's Rep. 443 (United State); *American Smelting & Refining Co. S. S. 'Irish Spruce' v Irish Shipping Co. Ltd. (The Irish Spruce)* [1976] 1 Lloyd's Rep. 63, at p. 68 (US District Court of New York).

¹⁶⁴ Clause 52 of Shelltime 4 provides: "Owners warrant that the vessel is in all respects eligible under application (sic) conventions, laws and regulations for trading to and from the ports and places specified in Clause 4 of the Charter Party...but not limited to, MARPOL 1973/1978 as amended and SOLAS 1974/1978 as amended and extended."

¹⁶⁵ *Golden Fleece Maritime Inc v ST Shipping and Transport Inc (The Elli & The Frixos)* [2008] 2 Lloyd's Rep. 119; [2009] 1 All ER (Comm) 908.

ballast tanks as required by the new MARPOL regulations.¹⁶⁶ It was held that the warranty in Clause 52 of the charter applied both upon and after delivery of the vessel to the charterer. Furthermore, the same clause explicitly applied to future sailings and expressly referred to the SOLAS and MARPOL Conventions. Thus, the vessel was unseaworthy for not complying with the new amendment of MARPOL as required by Clause 52.¹⁶⁷ It is questionable whether the industry standards contained in such regulations are adequately effective to guarantee that applying the current rules regarding the obligation to exercise due diligence will make the ship seaworthy. Since the current obligation of exercising due diligence to provide a seaworthy vessel is limited to the beginning of the voyage, it will not cover any regulatory requirement introduced by SOLAS after the vessel has commenced her voyage.¹⁶⁸ It can be said that it would be beyond doubt if a clear obligation in the contract of carriage forced the shipowner to adopt new regulations. This is commensurate with saying that the obligation is an ongoing one. Even where the obligation of obtaining a document relating to SOLAS or other certificates of the IMO was not required prior to the commencement of the voyage, or at least at the time of delivery of the ship, this does not equate to the obligation to 'maintain the vessel in or restore her to' her condition on delivery. Therefore, the standard of due diligence may not be adequate even if it is meant to be ongoing. This is because in maintaining seaworthiness, the standard will be based on a standard that was set at the

¹⁶⁶ Regulation 13H(5) of the MARPOL Convention came into operation on 4 December 2003.

¹⁶⁷ It is difficult to argue that obtaining a document which was not required at the time of delivery can be part of an obligation to 'maintain the vessel in or restore her to' the condition in which she was at delivery.

¹⁶⁸ Certain countries have taken the lead in promoting safety and seaworthy vessels by adopting new navigational and other safety requirements in advance of the international conventions. Ropner, W. G. D., 'Promoting High Standards at Sea - The Shipowners' Contribution', a paper delivered in *Fitness at Sea - The International Conference on Seaworthiness* (1980) organised by Newcastle University, at p. 44.

time before and at the beginning of the voyage or at her delivery, rather than one which is set to the prevailing circumstances. As a result, the standard of seaworthiness will not take regard of the new regulations when they are being enforced, i.e. after the commencement of the voyage. The standard is, however, said to be raised if a new regulation under the conventions comes into existence that requires the shipowner to carry out further tasks, such as modification of the hull, other than those previously required for maintaining the vessel. This is possible only if there is a clause in the charterparty that obliges the shipowner to do so. Otherwise, the owner is obliged to carry out such modification before a new contract of carriage is agreed, when the regulation would be triggered as part of his initial obligation of due diligence.¹⁶⁹

The Elli and The Frixos confirmed that the court will not take into consideration developments in the industry that arise any time after the vessel commences her voyage but during the course of the charter period as part of the due diligence obligation, assuming that the obligation is not an ongoing one. Therefore, it was noted that considerations of expediency are already reflected in the charterparty contract and to add a clause to them would result in an extension of the shipowner's obligation to exercise due diligence to provide a seaworthy vessel beyond the basic obligation under the Hague/Hague-Visby Rules.

The case further confirms the need for the obligation of seaworthiness to be extended throughout the entire voyage in order to create a fairer

¹⁶⁹ To that extent, the charterer will be prevented from trading in some parts of the world. *Golden Fleece Maritime Inc v ST Shipping and Transport Inc (The Elli & The Frixos)* [2008] 2 Lloyd's Rep. 119, at p.127. Sir Anthony Clarke MR stated that "at a particular South East Asian country suddenly required all fuel oil carrying vessels to be doubled hulled."

charterer/shipowner relationship, as opposed to relying on an initial obligation such as that under the Hague/Hague-Visby rules, if a clause requiring ongoing due diligence of seaworthiness is absent from the charterparty contract. If a contract of carriage is governed by the Hague/Hague-Visby Rules, the court, in reference to case law that states “*It is not the duty of an owner to adopt or use the latest inventions or regulations*”,¹⁷⁰ may be reluctant to take into account the application of new technology as part of the carrier’s obligation of exercising due diligence to provide a seaworthy vessel. The “*slowness of the traditional procedure for adoption and entry into force of the international regulations and conventions [e.g. SOLAS]*”,¹⁷¹ makes a shipowner reluctant to apply new provisions of SOLAS or any other regulations, for example to fit new equipment, even when their presence is essential to the vessel’s seaworthiness,¹⁷² such as radar equipment¹⁷³ or a Loran system.¹⁷⁴

As regards a contract of carriage, without a binding system of compliance with new standards in new regulations or without a regime that imposes a continued obligation of seaworthiness (although not necessarily as part of public law

¹⁷⁰ *F. C. Bradley & Sons Ltd. v Federal Steam Navigation Company*, *supra*, see Lord Justice Scrutton at pp. 454-455. See also *Virginia Co. v Norfolk Shipping Co.* 17 Com. Cas. 277, at p. 278.

¹⁷¹ Sir Michael Wood, ‘Lawmaking and implementation in International Shipping: Which Law Do We Obey?’ Tenth Cadwallader Memorial Lecture, 1 October 2008. Cited at <www.shippinglbc.com/content/uploads/documents/cad10_mensah.pdf>.

¹⁷² *The T.J. Hooper* 60 F.2d 737, 1932 AMC 1169 (2 Cir. 1932) where Hand J decided that tugs should be equipped with radios, although their use on such vessels at that time was still not customary. See also Tetley, W., *Marine Cargo Claims* (4th ed., 2008), Chapter 15 ‘Due Diligence to Make the Ship Seaworthy’, at p. 42.

¹⁷³ In *President of India v Coast S.S. Co (S.S. Portland Trader)* 213 F. Supp 352 at pp.356-357; 1963 AMC 649 at p.654; [1963] 2 Lloyd’s Rep. 278 at p.281 (D. Ore. 1962). The District Judge commented on the desirability of having radar on-board vessels. The judge warned however that in the near future it was most likely that radar would become a condition of seaworthiness. The court held that, with the brilliant clarity of hindsight, it was easy to rationalise how the disaster could have been avoided if the vessel had been equipped with either one of these modern aids to navigation (radar or Loran), but the court has the duty to determine the seaworthiness of the vessel from the standpoint of the commencement of the voyage rather than measuring the standard by what happened at the time of the incident.

¹⁷⁴ A subsequent judgment on this question is *Argo Merchant Lim Procs.* 486 F. Supp. 436 at p. 459; 1980 AMC 1686 at p. 1702 (S.D. N.Y. 1980). Loran was not deemed essential.

enforcement), any regulations that come into operation after the commencement of the voyage will be ignored. This may reflect the limited obligation of due diligence that is imposed under the current regime, especially if invalid certificates cause legal unseaworthiness. For example, the failure to fit the vessel with certain equipment might render its safety certificates¹⁷⁵ invalid, which might lead to a delay or prohibit the vessel from proceeding to sea or entering a port. As a result, the vessel will be legally unseaworthy due to its lack of certification.¹⁷⁶

4.6.2 Problems of the Current Law and the Need for New Rules

Under the Hague/Hague-Visby Rules, the obligation of due diligence expires upon sailing from the port of loading and does not apply to each stage of the voyage.¹⁷⁷ Any new requirements under regulations that govern industry standards will not be adhered to after leaving the load port. This is normally the case for an obligation under the Rules which starts and is ongoing until the time the vessel commences her voyage. Accordingly, the Rules confer no ongoing obligation on the shipowner to exercise due diligence, i.e. by complying with new regulations during the sea voyage. This is seen to avoid the important ongoing duty to keep the vessel in line with the latest regulations, especially

¹⁷⁵ *Golden Fleece Maritime Inc v ST Shipping and Transport Inc (The Elli & The Frixos)* [2008] 2 Lloyd's Rep. 119.

¹⁷⁶ SOLAS, Chapter V, Regulations 19 & 20 were implemented into UK domestic law by the Merchant Shipping (Survey and Certification) Regulations 1995, SI 1995/10, as amended. SI 1995/21 and 1995/1692. No UK-flagged ship may proceed to sea unless it has been surveyed and there is in force the following certificate(s): in the case of a passenger ship engaged on international voyages, a Passenger Ship Safety Certificate, or, if the ship is only engaged on short international voyages, a short international voyage Passenger Ship Safety Certificate; in the case of a cargo ship of 300gt or more engaged on international voyages, a Cargo Ship Safety Radio Certificate, Cargo Ship Safety Equipment Certificate and a Cargo Ship Safety Construction Certificate.

¹⁷⁷ Article III, r. 1, HVR.

those important regulations, which if contravened, will render the vessel unseaworthy.

- The Example of Container Shipping

An English court has expressed the relevant test as being “*would a prudent shipowner, if he had known of the defect, have sent the ship to sea in that condition?*”¹⁷⁸ Equally, the test to be applied under the Rotterdam Rules for a vessel that has not adhered to new regulations which may affect her seaworthiness is “*would a prudent shipowner, if he had known of the new regulations, have continued the intermediate voyage without affecting any possible compliance?*”¹⁷⁹ In the age of containerised shipping, it seems that vessels are more likely than ever to call into intermediate ports.¹⁸⁰ This is where the ongoing obligation of due diligence under the Rotterdam Rules becomes more important in solving the problems of unseaworthiness that might arise due to non-compliance with new regulations, especially for containerised vessels which did not come about until after the drafting of the Hague/Hague-Visby Rules. Under the Rotterdam Rules, it is possible that the same ship will be subject to different findings as regards seaworthiness and, in turn, the liability of the carrier, depending on the port of loading if cargo was loaded at two different ports.

¹⁷⁸ *McFadden v Blue Star Line* [1905] 1 K.B. 697.

¹⁷⁹ See Nicholas, A., ‘The duties of carriers under the conventions: care and seaworthiness’, cited as Chapter 6 of Thomas, R., *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd’s List, 2010), at p.116.

¹⁸⁰ It is common for container vessels to be involved with large numbers of loading/discharging ports. For instance, a container vessel may load cargo from the Far East destined to North Africa and en route she may call at two ports in the Middle East.

For instance, assume a vessel commenced her voyage from Port A to Port C and called at Port B with perishable, refrigerated cargo on board. The container was loaded at Port A when the vessel was classed as being seaworthy and it then sailed to Port B where another container was loaded, destined for Port C. In the course of sailing to Port B, a new regulation came into force. When she arrived at Port C, the vessel was detained for some days by the Port State for not having a valid certificate reflecting compliance with the new regulation, which resulted in the refrigerated cargoes in the three containers being damaged. Consequently, the carrier will not be liable for the damage that occurred to the container that was loaded in Port A. As the vessel was seaworthy, whereas the carrier would be liable for the damage that occurred to the cargo in the container that was loaded in Port B, as she was unseaworthy for not being in compliance with the regulations.¹⁸¹ As the overriding obligation was breached in Port B, the carrier will not be allowed to use any of the exceptions under Article IV, r.2 of the Hague/Hague-Visby Rules. On the other hand, for the damage that occurred in the container loaded in Port A, the shipowner is able to cite exceptions under Article IV, r.2 despite the fact that damage to the cargo resulted from the same cause. The effect of the new regulation was therefore different for each of the owners of the containerised cargo.¹⁸² Accordingly, the change brought about by Article 14 of the Rotterdam

¹⁸¹ In *Leesh River Tea Co. v British India Steam Navigation Co.* [1966] 2 Lloyd's Rep. 193, damage was caused to the cargo at an intermediate port by stevedores who had stolen a brass cap. This caused water to enter the cargo hold resulting in damage to a cargo of tea. The court decided that when the stevedores committed the theft, they were not acting as a servant or agent of the carrier. Therefore, the carrier was able to rely on Article IV, r.2(q), HVR. Had the stevedores been acting in the course of their employment, they would be considered as an agent or servant of the carrier. In such circumstances, the carrier will not be able to rely on the exception in sub-clause (q) and the vessel will be rendered unseaworthy. In this case, there was unseaworthiness in a practical sense but not in the sense of liability.

¹⁸² This principle is applicable even where the containerised cargoes are subject to the same contract of carriage but loaded at different neighbouring ports and bound for the same

Rules is likely to lead to fairer consequences in such circumstances. If the Rotterdam Rules governed the bill of lading, the court in a similar case would undoubtedly hold the shipowner in breach of exercising due diligence to provide a seaworthy vessel founded on non-compliance with new regulations such as those provided under SOLAS.

English courts should not find it difficult to apply the extended obligation of seaworthiness to the entire voyage. This is for two reasons. First, English courts are familiar with the ongoing duty imposed on the carrier in time charterparties, which contain a clause obliging the shipowner to ensure the fitness of his vessel on an ongoing basis, even during the course of the voyage.¹⁸³ This means that if unseaworthiness arose after leaving the port of loading, the shipowner, his servants or agents should exercise due diligence to bring the vessel back to a seaworthy state.¹⁸⁴ Secondly, the common law doctrine of stages is generally accepted to be good law. It provides some commercial flexibility for vessels to commence their voyage from their loading port without incurring superfluous delays by complying with charterparty obligations to provide a seaworthy vessel. This is, for example, when the condition of the vessel has a deficiency or cannot comply with the relevant regulations at the loading stage; the deficiency will not be held to amount to a breach of the duty of seaworthiness provided that the

destination. See Berlingieri, F., *The Liability of the Carrier by Sea in Studies on the Revision of the Brussels Conventions on Bills of Lading* (Genoa, 1974), pp.68 and 95.

¹⁸³ Maintenance clauses such as that in the NYPE 1993 charterparty in lines 81-82 which states: "that the owners shall maintain the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service". See also NYPE 93, Clause 6 lines 80-82; BALTIME 1939, Clause 3 lines 43-48; GENTIME Clause 11 lines 263-267. See also *Golden Fleece Maritime Inc v ST Shipping and Transport Inc (The Elli & The Frixos)* [2008] 2 Lloyd's Rep. 119.

¹⁸⁴ *Snia v Suzuki* (1924) 17 Ll. L. Rep. 78, where Greer J said: "though that does not mean that she will be in such a state during every minute of the service, it does mean that when she gets into a condition when she is not thoroughly efficient in hull and machinery, they will take within a reasonable time reasonable steps to put her into that condition," p. 88.

breach is remedied by the sailing stage or at an intermediate stage.¹⁸⁵

Analogous with the common law¹⁸⁶ doctrine of stages, the English courts would not find it difficult to impose an ongoing obligation of seaworthiness, which may render the vessel unseaworthy for not calling at an intermediate port to take reparative action, e.g. by fitting new equipment to comply with the latest regulations, for the purpose of maintaining the obligation of seaworthiness during the course of voyage. It is widely known that, nowadays, ports are well-equipped with agents and ship chandlers who are able to provide vessels with supplies and repair services during their loading/unloading operations.

- The Impact of Shipping Standards and Crew Negligence

If the implementation of shipping industry standards is imposed by extending the obligation of due diligence to cover the entire voyage, the carrier may be liable for not applying new standards of safety contained in new regulations, which require the carrier to have, for example, additional certificates. Assuming that the vessel cannot enter the discharge port, non-compliance with shipping industry standards will result in legal unseaworthiness. Usually, if new regulations come into operation under SOLAS, the carrier, through the

¹⁸⁵ *The Quebec Marine Insurance Company v The Commercial Bank of Canada* (1869-71) L.R. 3 P.C. 234. Lord Penzance stated: "*The case of Dixon v Sadler and the other cases which have been cited, leave it beyond doubt that there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward of a whaling voyage, for some definite, well-recognised, and distinctly separate stage of the voyage,*" p.241. See also *The Vortigern* [1899] p.140.

¹⁸⁶ The charterparty doctrine of stages, under which the vessel is required to be seaworthy at the commencement of each stage, is not applicable under the Hague/Hague-Visby Rules. See *Leesh River Tea Co. v British India Steam Nav Co.* [1966] 2 Lloyd's Rep. 193. A vessel was held not to be unseaworthy within the meaning of Art. III when the cargo was damaged by the surreptitious removal of a storm valve plate by a person unknown while the vessel was calling at an intermediate port.

designated person ashore (DPA),¹⁸⁷ would instruct his employees to make certain modifications or if such modifications cannot be carried out by the ship's crew and the vessel needs dry docking, modifications required by the new regulations may be carried out at a dry dock. The obligation to exercise due diligence is not delegable,¹⁸⁸ even where the carrier delegates a task to dry dock personnel. This means that simple negligence of the crew will render the ship unseaworthy, as well as negligence of the dry dock's workers, for any loss of the cargo that is caused by unseaworthiness. Even if the carrier has delegated work that requires special knowledge to an independent, competent and professional contractor, the work or modification that is carried out by the contractor should comply with the due diligence obligation. If the claimant alleges that modifications carried out by the independent contractor caused damage to the cargo, the carrier should, in order to escape liability, demonstrate that the contractor has exercised due diligence in carrying out their work.¹⁸⁹ A carrier may be liable for unseaworthiness where he has failed to comply with regulations governing the employment of the crew, e.g. STCW and/or the operation of the vessel, e.g. SOLAS. The carrier may also be liable where the crew's or a contractor's negligence in modifying the vessel has caused loss or damage to the cargo. This could mean that a greater focus will be placed on the

¹⁸⁷ The role of the designated person, mentioned in the ISM Code, is of great importance, as he would be liaising between the ship and the management of the shipping company. Article 4 of the ISM Code entitled: 'Designated person' reads "*To ensure the safe operation of each ship and to provide a link between the Company and those on-board, every Company, as appropriate, should designate a person or persons ashore having direct access to the highest level of management. The responsibility and authority of the designated person or persons should include monitoring the safety and pollution-prevention aspects of the operation of each ship and ensuring that adequate resources and shore-based support are applied, as required.*"

¹⁸⁸ *The Muncaster Castle* [1961] A.C. 807 (HL), p. 836, per Viscount Simonds; *The Happy Ranger* (No. 2) [2006] 1 Lloyd's Rep. 649.

¹⁸⁹ *The Amstelslot* [1963] 2 Lloyd's Rep. 223(HL). It was held that the inspector was not negligent, as the crack was undetectable when due diligence was exercised in inspecting the ship and there was no obligation to conduct additional tests, p.234-235, per Lord Devlin.

risk of negligence from the employees, crew and contractors of the carrier in performing their duties (e.g. when modifying the vessel in order to comply with regulations), as opposed to a failure to comply with regulations directed at the carrier to reach a particular standard. In other words, in future, the emphasis will be mainly placed on the crew's or the contractor's negligence in complying with the regulations rather than the impact of not complying with the regulations in the first place. Failure to comply with the particular standards required by the regulations could result from the DPA not communicating with the vessel's staff when directed by the carrier to instruct them to carry out modifications reflecting a new standard under new regulations. Bearing in mind the risk of liability that can result from the negligence of the crew when complying with the regulations, the carrier will be more careful to avoid such a risk by instructing and making sure that the crew and contractors are exercising due diligence when modifying the ship. The more emphasis that the carrier places on the risk of liability resulting from his crew's negligence, the more likely that the carrier will be proactive in exercising due diligence. For example, where a new SOLAS safety standard requires a new certificate for existing ships following modification of the ship's cargo hold, the carrier as part of the on-going due diligence obligation will instruct his crew to modify the vessel's hold pursuant to the new regulations. If the carrier fails to comply with the new regulations and was not issued with a new certificate, perhaps due to the negligence of the DPA in failing to instruct the crew, the carrier may be liable for legal unseaworthiness if, for example, the ship was prohibited to enter the discharge port and damage to perishable cargo followed. On the other hand, if the carrier through the DPA has instructed his crew to carry out the necessary modifications pursuant to the new regulations

but the modifications were carried out negligently, whether by the crew or expert contractors, and such negligence caused damage to the cargo, the carrier will be liable for an unseaworthy ship. This will have a greater impact on the way that the seaworthiness obligation is exercised, e.g. a shipowner is likely to plan well in carrying out the modification rather than simply issuing orders with a view to compliance with the new regulation. The carrier will be more vigilant in performing his obligation of due diligence. This can be achieved by a shipowner frequently asking what can be done to avoid liability and how he should perform his obligations. The carrier will also be more proactive in exercising his seaworthiness obligation. It is suggested that a good way to achieve compliance is by assessing risk constantly.

4.7 Conclusion

Compliance with shipping industry standards varies from one country to another and thus from one carrier to another. The IMO has no effective means of verifying the implementation of the standards and leaves the matter of compliance to each Member State. This results in a varied standard of compliance and hence matters related to the vessel's seaworthiness in particular States are directly or indirectly affected. Also, it is right to say that, in general, safety standards in the shipping industry are inadequate or dated and should embrace the thrust of development. However, making the effective implementation of industry standards compulsory would increase the standard of safety and perhaps seaworthiness.

This Chapter has provided some recommendations that, on their implementation, would produce sound regulation and a policy of compliance. The regulations of the shipping industry must be updated in relation to incidents at sea and must also be regulated on a proactive basis. That can be ensured by carrying out further research to promote better shipping practices.

More importantly, despite the fact that the shipping industry's conventions are not specifically part of the Hague/Hague Visby Rules,¹⁹⁰ in order to prevent or reduce the direct or indirect impact of inadequate industry regulations, the obligation of exercising due diligence to provide a seaworthy vessel must be extended to cover the entire voyage.

¹⁹⁰ The shipping industry's body of rules is promoted as a "...*framework upon which good practice should be hung*." Statement made by Captain Haakansson, an expert in the case *Papera Trades Co Ltd v Hyundai Merchant Marine Co. Ltd (The Eurasian Dream)* [2002] 1 Lloyd's Rep. 719, at p.743.

CHAPTER FIVE

THE IMPLICATION OF THE MULTIMODAL ASPECT OF THE ROTTERDAM RULES ON THE SEAWORTHINESS OBLIGATION AND THE CONSEQUENT LIABILITY

“He it is who enableth you to traverse through land and sea; so that ye even board ships; they sail with them with a favourable wind, and they rejoice threat; then comes a stormy wind and the waves come to them from all sides, and they think they are being overwhelmed: they cry to Allah, sincerely offering (their) duty unto him saying, If thou dost deliver us from this, we shall truly show our gratitude.”

(Yunus, Chapter 10, Verse 22)

5.1 Introduction

The advent of the container has increased the transportation of door-to-door goods on a multimodal basis. This development cannot, to a certain extent, be regulated by the current law on carriage of goods by sea that applies only to ‘tackle-to-tackle’¹ sea carriage. There has been evidence of a need for a regime with a wider scope than that existing, in order to address the legal problems that arise from door-to-door operations. For example, the carriage of containerised goods can raise problems when the damage inside the container is unlocalised; i.e. where it is hard to determine the exact point that the damage to the goods inside the container occurred and whether it occurred during the carrier’s scope of responsibility. The lack of a unified door-to-door regime requires that the parties, in order to ascertain issues of liability and identify the applicable

¹ Article 1(e) of the Hague/Hague-Visby Rules.

contract of carriage in the event of loss, damage or delay,² need to refer to the responsibility of the carrier in various contracts, which may be set out in legal regimes that are mandatory, based on implied rules of national law or regulated by contract.³ The various legislative attempts, through mainly international instruments on multimodal transport, to extend the application of the sea carriage regime beyond the 'tackle-to-tackle' principle, have failed.⁴ The Rotterdam Rules attempt to address this need by extending the scope of cover to the entire contract of carriage in multimodal/door-to-door transport operations, provided that a sea leg is included.⁵

Problems of multimodality have been extensively discussed in earlier studies, but there does not appear to be a study discussing the effect of multimodality on the obligation of seaworthiness. Insofar as seaworthiness and multimodal carriage under the Rotterdam Rules are concerned, it is essential, in this Chapter, to discuss the problems under the current regime and the need for the creation of a multimodal regime. Also, the importance of attaching the obligation of exercising due diligence when providing a seaworthy vessel to the sea leg

² Hereinafter will be referred to as 'loss'.

³ Glass, D., *Freight forwarding and multimodal transport contracts*, (2012, LLP), at para.1.31.

⁴ E.g. the ICC Uniform Rules for a combined Transport Document 1975 (based on the TCM Draft Convention 1975, UN Doc TRANS/370 CTCIII/1, Annex I) and the UNCTAD ICC Rules for Multimodal Transport Documents 1992 (based in part on International Multimodal Transport Convention 1980, UN Doc TD/MT/CONF/16, not in force); the UN Convention on the Carriage of Goods by Sea (The Hamburg Rules) that applies to 'port-to-port' operations Article 1.6 and Article 4.1. See generally Wit, R., *Multimodal Transport*, (London, 1995); Glass, D., *Freight Forwarding and Multimodal Transport Contracts*, (London, 2012), para. 3.1. Lorenzon stated that: "*the dissatisfaction expressed by the industry may be understandable in the context of small and medium enterprises trying to access the market. The way the international community has tackled this conundrum is to develop what may be referred to as multimodal thinking for unimodal transport approach; ie a philosophical endemic distortion of the unimodal regimes which seeks to tackle specific multimodal problems on a piecemeal basis. Provisions of multimodal regimes are all complex variations of ad-hoc solutions to specific problems but are certainly not multimodal in nature.*", see Lorenzo F., 'Multimodal Transport Evolving: Freedom and Regulation Three Decades after the 1980 MTO Convention' cited as Chapter 7 in Clarke M., *Maritime Law Evolving*, (Hart Publishing, 2013), at p. 166

⁵ 'Maritime-plus' Convention. See UN Committee on International Trade Law [UNCITRAL] Working Group on Transport Law, Report of the Working Group on Transport Law on the Work of Its Fifteenth Session (Vienna, 4-15 July 2005).

will be addressed. The scope of the Rotterdam Rules, and in particular the provisions of Article 82 and their impact on the duty of seaworthiness, which was intended to solve the problem of conflicting obligations under other international transport conventions, will also be dealt with. It will be shown that particular aspects of multimodal transport may confuse the specific duties of seaworthiness identified and imposed by Article 14. The involvement of other conventions may cloud the guidance as to the applicable standard of care in relation to seaworthiness. The purpose of this Chapter is to discover the impact of the multimodal 'door-to-door' concept on the duty or obligation of seaworthiness and the consequent liability, whilst also suggesting some solutions.⁶ In addition, this Chapter attempts to ascertain whether it would be preferable for the parties to deal with the duty or obligation of seaworthiness from the perspective of a contract of carriage made on a 'door-to-door'/multimodal basis or on the basis of a contract of carriage as limited by the 'tackle-to-tackle' regime.

5.1.1 Introduction to the Supply of Containers⁷

In practice, containers are supplied either by the carrier or by the shipper. It is essential to briefly outline the two different scenarios to which reference will be made in the following Chapters.

Scenario One – Container Supplied by the Shipper

⁶ Some legal problems surrounding the Rotterdam Rules are believed to be similar to those that arose with other multimodal systems but, due to the extension of the obligation to the container and for a duration that covers the entire sea voyage, these legal problems might have a heavier impact on the operator or the cargo-interest with regard to the Rotterdam Rules as opposed to other conventions.

⁷ This introduction is a summary extracted from Chapter. 4 in Glass, D., *Freight forwarding and multimodal transport contracts*, (Informa, 2012), Ch.4.

Where the shipper supplies the container, generally speaking, the carrier will not be liable for the defective condition of the container, which causes damage to the cargo inside it,⁸ unless the carrier should have inspected the container and also dealt with any apparent defects that were discoverable upon a reasonable inspection.⁹ The carrier may also be liable if he was responsible for stuffing the container and while doing so created a defect by improper stowage.¹⁰

Liability may arise in three ways. First, the carrier may be liable for the inherent defect of the container that was present prior to carriage.¹¹ It is argued however that the carrier is probably not liable for damage caused by this type of defect.¹² Second, the carrier may be liable for failing to inspect the containers where he was required to do so and also for failing to remedy any defects.¹³ Finally, the carrier will be liable where a defect in the container has come about as a result of the carrier's (or his employees') negligence.¹⁴ This may occur where the goods themselves or the way the goods were stuffed inside the container (by the carrier) damaged the cargo and/or the container. Alternatively, damage may result from the way in which the goods are handled, loaded on board the ship and/or cared for during carriage.¹⁵ While unlikely, it is possible that a carrier

⁸ Glass, D., *Freight forwarding and multimodal transport contracts*, (Informa, 2012), at para. 4.126.

⁹ P. Bugden, P. et al., *Goods in Transit*, (Sweet & Maxwell, 2009), at para.18.05 (Carrier as a bailee of the container); See Glass, D., *Freight forwarding and multimodal transport contracts*, (Informa, 2012), at para.4.116-4.117 and 4.123.

¹⁰ Bugden, P. et al., *Goods in Transit*, (Sweet & Maxwell, 2009), at para.18.02

¹¹ See Glass, D., *Freight forwarding and multimodal transport contracts*, (Informa, 2012), at para. 4.57.

¹² Bugden, P., 'What if a container unsuitable for the intended cargo?' at http://www.forwarderlaw.com/library/view.php?article_id=138.

¹³ See Glass, D., *Freight forwarding and multimodal transport contracts*, (Informa, 2012), at para.4.116-4.117 and 4.123; De Wit, R., *Multimodal transport*, (LLP, 1995), at para. 9.24;

¹⁴ Bugden, P. et al, *Goods in Transit*, (Sweet & Maxwell, 2009), at para.18.02

¹⁵ See Glass, D., *Freight forwarding and multimodal transport contracts*, (Informa, 2012), at para.4.126

may be responsible for the container even where it is supplied by the shipper or someone acting on the shipper's behalf.

Scenario Two – Container Supplied by the Carrier

If the container is supplied by or on behalf of the carrier, the carrier is more likely to be liable for damage that is caused by the container's defective condition. The carrier is likely to be liable for (1) the inherent defect of the container¹⁶; (2) any failure to inspect the container and fix reasonably obvious defects¹⁷; and, (3) rendering the container defective as a result of negligent handling prior to loading the container on the ship or improper care during the sea carriage.¹⁸

However, where the shipper was responsible for stuffing the container – even where the container is supplied by the carrier – damage caused by improper stowage of the cargo inside the container may fall on the shipper.¹⁹ Further, the shipper will also be liable for any negligent handling of the container.²⁰

This scenario begs the question of how far, pursuant to Article 80 of the Rotterdam Rules, the carrier may exclude his liability for damage even where he has supplied the container. If the preconditions set out in Article 80(2) are

¹⁶ Bugden, P., 'What if a container unsuitable for the intended cargo?' at http://www.forwarderlaw.com/library/view.php?article_id=138.

¹⁷ See Glass, D., *Freight forwarding and multimodal transport contracts*, (Informa, 2012), at para.4.116-4.117 and 4.123; De Wit, R., *Multimodal transport*, (LLP, 1995), at para. 9.24; Stevens, F., 'Liability for defective containers: chartering a course between seaworthiness, care for the cargo and liabilities of shippers', cited as Chapter 2 in B. Soyer and A. Tettenborn, *Carriage of Goods by Sea Land and Air*, (Informa, 2013), at p.38.

¹⁸ De Wit, R., *Multimodal transport*, (LLP, 1995), at para. 9.62-9.63 and 9.66.

¹⁹ See Glass, D., *Freight forwarding and multimodal transport contracts*, (Informa, 2012), at para. 4.128.

²⁰ See Glass, D., *Freight forwarding and multimodal transport contracts*, (Informa, 2012), at para. 4.125.

met,²¹ the parties to the volume contract may agree to shift the duty to exercise due diligence to make and keep the container supplied by the carrier cargoworthy, from the carrier to the shipper. This derogation from the cargoworthiness obligation may relieve the carrier of responsibility for any damage caused by an uncargoworthy/unseaworthy container. In other words, Article 80 may shift the responsibility for cargo damage caused by a container that was supplied by the carrier from the carrier to the shipper.²²

5.2 Problems under the Current Law

The Hague/Hague-Visby Rules (as amended) were initially adopted in 1921. At that time, the shipping trade focused on sea carriage only, e.g. tackle-to-tackle, where the cargo was mainly handled at the ports of loading and discharge. This explains why there was no requirement for a system beyond the scope of 'tackle-to-tackle'²³ responsibility for the carrier. The subsequent development of

²¹ Article 80(2) provides that: "A derogation pursuant to paragraph 1 of this article is binding only when:

- (a) The volume contract contains a prominent statement that it derogates from this Convention;
- (b) The volume contract is (i) individually negotiated or (ii) prominently specified the sections of the volume contract containing the derogations;
- (c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Conventions without any derogation under this article; and
- (d) The derogation is neither (i) incorporated by reference from another document no (ii) included in a contract of adhesion that is not negotiation"

²² Nikaki, T., 'The obligation of carriers to provide seaworthy ships and exercise care', cited as Chapter 4 in, Thomas, R., *A new Convention for the Carriage of Goods by Sea - The Rotterdam Rules: An Analysis of The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Lawtext Publishing Limited, 2009), where she stated that "it was stated that the parties to a volume a volume contract are therefore allowed to agree on greater or lesser rights, obligations and liabilities than those imposed by Article 14(c) provided that the safeguard set out in Article 80.2 are met." at p.108.

²³ Article 1(e) of the Hague/Hague-Visby Rules provides the 'tackle-to-tackle' scope of cover, "'carriage of goods' covers the period from the time when the goods are loaded on to the time they are discharged from the ship."

the liner trade and containerised transportation²⁴ has created a need for the carrier to assume further responsibility from the point when he receives the cargo to the point of its ultimate delivery, and to assume the risk of the whole carriage from the place of the exporter to the cargo's final destination.²⁵ Nonetheless, the development in international law has not kept apace.²⁶

This uncertainty has raised the question: what is the regime that should govern the liability of unseaworthiness? This is particularly true for, first, 'unlocalised' damage. The term 'unlocalised' in distinction to 'localised' is used by the Rotterdam Rules in relation to cargo loss or damage when it is unknown at the stage or leg, i.e. the mode, at which the loss to the containerised cargo occurred. So, where the container has moved through different modes of carriage, it is difficult to determine at which stage the damage occurred.²⁷ Take for example, a container that was carried by road and subsequently put on the deck of a ship for sea carriage, and, on arrival at its destination, the cargo was

²⁴ UNCTAD Secretariat, *Implementation of Multimodal Transport Rules*, para. 7, delivered to the United Nations Conference on Trade and Development, UN Doc. UNCTAD/SDTE/TLB/2 (June 25, 2001). See *id.* para. 7 stating that containerisation in the 1960s led to operators taking 'responsibility for the whole transport chain under one single transport contract'.

²⁵ UNCTAD Secretariat, *Implementation of Multimodal Transport Rules*, para. 7, delivered to the United Nations Conference on Trade and Development, UN Doc. UNCTAD/SDTE/TLB/2 (June 25, 2001).

²⁶ As a result, problems emerged from the rigidity of the legal regimes regulating international carriage. For example, the Hague/Hague-Visby Rules system of liability was unable to deal with the above two legs of transport and was able to deal only with the liability of the ocean carrier in an isolated manner (see Berlingieri, F., 'Multimodal Aspect of The Rotterdam Rules', a paper presented at the Colloquium of the Rotterdam Rules 2009 held on September 21, 2009, p.2 Papers-colloquium, <http://www.rotterdamrules2009.com/cms/index.php?page=text-speakers-rotterdam-rules-2009>; Fujita, T., 'The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implications' (2009) 44 *Tex.I.L.J.*, pp.349-373, p.351 stating that the current system is artificially separating the transport chain and creating difficulties for the application of different regimes that are involved in the different means of transport.

²⁷ See, Glass, D., *Freight forwarding and multimodal transport contracts*, (LLP, 2012), another problem of unlocalised damage is "whether the damage occurred while the goods are the responsibility of the carrier" at para.1.31; Alcantara, J., "The new regime and multimodal transport", [2002] LMCLQ 399, states that: "Container claims nearly always involve concealed damage, so there is generally little proof as to whom or what caused the damage," at p. 403; See UNCITRAL Doc A/CN.9/526 of May 2003, Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March to 4 April 2003) (36th session, Vienna, 30 June-11 July 2003), para 264.

found damaged by fresh water that entered through the roof. The problem with this carriage is the difficulty in ascertaining the place at which the damage occurred, i.e. during sea or inland carriage, in order to identify the responsible carrier/operator for the damage and the relevant legal regime regarding liability, whether mandatory, implied or governed by contract.²⁸ Second, there is a problem regarding the defective container. The question of any damage or loss to the cargo or ship caused by the defective container is considered differently in various jurisdictions. Some jurisdictions consider the defective container to fall within the scope of the seaworthiness obligation under Article III, r.1 where other jurisdictions consider the defective container as part of the obligation under Article III, r.2.²⁹ The application of other transport conventions might also create problems.³⁰ Marine risks and the liability of seaworthiness are unique to sea carriage only,³¹ which dictates that other transport conventions might be unsuitable to govern the liability of unseaworthiness claims. Such multiplicity of regimes³² has certain consequences.³³

²⁸ Glass, D., *Freight forwarding and multimodal transport contracts*, (LLP, 2012), at para.1.31.

²⁹ See the discussion at para. 5.1.1. Such as Dutch, American and French law, where the unfitness of the container might give rise to uncertainty when determining which convention should govern liability for the unseaworthy container. The obligation of providing a seaworthy container and the liability for not doing so is discussed in Chapter Six.

³⁰ Even though the Rotterdam Rules is a multimodal regime, due to its limited network system, potential problems may exist. This point is further discussed below, para. 5.5, at p.357 and the following paragraphs.

³¹ See UNCTAD *Multimodal Transport: the feasibility of an international legal instrument*, p.15, in: UNCTAD Document UNCTAD/ SDTE/ TLB/2003/1; this is indeed true, particularly for developing countries, and for small- and medium-sized transport users, as it makes it more difficult for them to access the market without a predictable legal framework; Hill, C., *Multimodal Mayhem? Maritime Risk International* Vol. 18(3), (01 March, 2004).

³² The Convention concerning International Carriage by Rail (COTIF-CMI) of 9 May 1980 as amended by the Protocol of Modification of 3 June 1999 (Vilnius); The Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway of 22 June 2001 (CMNI); The Convention on the Contract for the International Carriage of Goods by Road - Geneva, 19 May 1956 (CMR).

³³ Hancock, C., 'Multimodal transport under the Convention' cited as Chapter 2 in *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules: Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*. (Lawtext Publishing Limited, 2009), p.39; UNCTAD Document, *Multimodal Transport: the feasibility of an international legal instrument*, p.10. It unavoidably leads to the conclusion that

There is a need, therefore, for a single liability regime that can apply to a contract of carriage by multimodal transport.³⁴

5.3 Scope of Application³⁵

The Rotterdam Rules take into account the need for a regime that can work side by side with any technological and commercial developments that take place in subsequent years.³⁶ The scope of application of the Rotterdam Rules is provided by Article 1(1) where a contract of carriage is defined as '*a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another*'. Other modes of transport can be combined with sea carriage. However, the sea leg is an absolute requirement whereas the other modes are not.³⁷ Thus, the Rotterdam Rules can have varying implications³⁸; i.e.

the current framework of the law of carriage by sea: (i) creates uncertainty; (ii) increases the transaction costs; (iii) increases the cost of legal advice through the necessity of increased legal and evidentiary enquiries; (iv) increases the cost, in general, of cargo claims and of the consequent litigation; and (v) increases the cost of insurance.

³⁴ The Convention of Multimodal Transport is often called a 'wet multimodal', 'maritime-plus' or a 'limited multimodal' convention. See UNCITRAL Doc A/CN.9/526 of May 2003, Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March to 4 April 2003) (36th session, Vienna, 30 June-11 July 2003), para 241, p.67, available at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html; Baatz, Y. et al. (eds.), *The Rotterdam Rules: A Practical Annotation* (London: Informa, 2009), paras. 5-10, p.16.

³⁵ The wording of the Rotterdam Rules does not mention multimodal transport but the scope of its application embraces door-to-door transportation.

³⁶ This is obvious from the definition in Article 1 (see particularly paragraphs 9 and 10, 17 - 23); Chapter 3 on 'Electronic Transport Records' and Chapter 8 on 'Transport Documents and Electronic Records', amongst others: modern transport practices, such as containerisation (Article 1(26), 27(3)) and door-to-door transport contracts (Articles 1(1), 11 & 13). See Fresnedo De Aguirre, C. 'The Rotterdam Rules from the Perspective of a Country that is a Consumer of Shipping Service', (2009) *Uni. L. Rev.*, 869-884, p. 871.

³⁷ Van der Ziel, G. 'Multimodal Aspect of the Rotterdam Rules', (2009), *Uni. L. Rev.* 981, p.982.

³⁸ The 'maritime-plus' scope of the application of the Rotterdam Rules, see Article 1.1 and Article 5.5 (subject to Articles 6, 7, 26 and 82). The door-to-door scope is not the only choice under the Rotterdam Rules. It can be contracted out of or the period of responsibility can be limited. See Diamond, A., 'The Rotterdam Rules', (2009) *LMCLQ* 445, at 465-467; Theodora, N., 'The UNCITRAL Draft Instrument on the Carriage of Goods [Wholly and Partly] [By Sea]: Multimodal at Last or Still All at Sea?' [2005] *JBL* 647, pp.652-653.

the scope may be port-to-port, tackle-to-tackle or door-to-door.³⁹ The multimodal system of the Rotterdam Rules might solve some of the problems of the current law that are set out above.⁴⁰ Nevertheless, issues may arise in relation to the practical consequences of the multimodal aspect of the Rotterdam Rules on the carrier's liability for seaworthiness. This study is the first to address the potential impact of the multimodality system of the Rotterdam Rules on the carrier's obligation of seaworthiness through their interrelation with other conventions.

- The Provisions in the Rotterdam Rules that Deal with Potential Conflicts with Other Transport Conventions

The door-to-door scope of the Rotterdam Rules may give rise to conflicts⁴¹ with other inland transport conventions such as CMR, CMNI and COTIF/CIM. The two articles that deal with potential conflicts between the various applicable legal regimes are Articles 26 and 82.⁴²

In general terms, the conflict problems are to be resolved on the basis of the type of loss. The Rotterdam Rules distinguish between 'localised' and 'unlocalised' loss. If this is known, one set of Rules applies. If it is not known at

³⁹ There are conditions; (1) the land place of delivery must be in a contracting state, and (2) the sea leg must be international. This is not an entirely revolutionary concept. It is common practice in the industry to extend the land carriage, for example, to the sea carriage by entering the paramount clause. Further, courts will not only enforce contractual provisions that extend maritime conventions inland, but also limitation clauses, such as a Himalaya clause, which extends the limitation of liability of the carrier to cover land workers such as servants and the agents of the carrier, as long as they are not independent contractors (see Sturley, F., 'Transport Law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules', in R. Thomas (ed), *A New Convention for the Carriage of Goods by Sea-The Rotterdam Rules*, (Lawtext Publishing Limited, 2009), p.1-33.

⁴⁰ See above para. 5.2, at p. 333.

⁴¹ See Diamond, A. 'The Rotterdam Rules', (2009) 4 LMCLQ 445, at p.453.

⁴² After a long discussion over the selection between adopting a 'network' or 'uniform' system to adequately suit the multimodal operator and govern multimodal carriage, the drafters of the Rules in Article 26 adopted the limited 'network system'. This can briefly be described as the Rotterdam Rules distinguishing between what is called 'localised' and 'unlocalised' loss or damage.

which stage of transport the loss, damage or delay occurred, another set of Rules will apply.

- (a) Localised loss:⁴³ Article 26⁴⁴ provides that where loss, damage or delay occurs during the non-sea stage, certain provisions related to liability, limitation of liability and time for suit will yield to the relevant provisions of the mandatory applicable law for that stage, provided that the relevant international convention⁴⁵ would have applied *if* the shipper had made a separate and direct contract with the carrier in respect of that stage.⁴⁶ As the obligation of seaworthiness is pertinent only to the '*specific obligations applicable to the voyage by sea*',⁴⁷ then it would suffice to briefly cover problems of localised damage in relation to the suggestion that the obligation of seaworthiness may be extended to inland carriage.
- (b) Unlocalised loss: Article 82⁴⁸ covers unlocalised damage, but it also covers localised damage at sea in situations where there is an issue

⁴³ The word 'loss' here is used in its wider sense to include cargo loss, damage or delay.

⁴⁴ Article 26, titled '*Carriage preceding or subsequent to sea carriage*', provides '*When loss of or damage to goods, or an event or circumstance causing a delay in their delivery occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:*

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument,'

⁴⁵ The scope of this Article is limited to the network system, van der Ziel, G. *Multimodal Aspects of the Rotterdam Rules* p.982; Fujita, T. 'The Comprehensive Coverage of the New Convention', (2009) 44 *Tex. Int. L. J.*, 345-373, p.357.

⁴⁶ Glass, D., "A sea regime fit for the twenty-first century? The UNCITRAL Draft Convention", 7 (2009) *STI* 2, at p.13.

⁴⁷ Pursuant to the heading of Article 14.

⁴⁸ Article 82, titled: '*International Conventions governing the carriage of goods by other modes of transport*' provides:

of conflict between conventions. In such a case, the Rotterdam Rules give way to other applicable conventions in order to prevent the simultaneous application of obligations provided by the Rotterdam Rules with conflicting obligations provided by other conventions. It is important to mention that if neither Article 26 nor Article 82 apply, then the other provisions of the Rotterdam Rules apply.

During land carriage, a container may be rendered unfit for the subsequent carriage by sea. This, in turn, may have an impact on the safety of the cargo in the container, on other cargoes and indeed on the vessel during the sea carriage stage. The obvious question, therefore, would be whether one should extend the obligation of seaworthiness to cover the land carriage leg. Any attempt to answer this question would inevitably raise the question as to what will be the legal implications of limiting the seaworthiness obligation to the sea carriage leg only.

5.4 The Importance of Extending the Obligation to Land Carriage

'Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

- (a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;*
- (b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;*
- (c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or*
- (d) Any convention regarding the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.'*

5.4.1 The Fitness of Containers

An example of containerised dangerous cargo will be used. It would not be true to state that a container may be rendered unfit for cargo carriage during the sea carriage leg only.⁴⁹ Under the provisions of the Rotterdam Rules, sea carriers, who supply the containers, may not know which safety regulations, i.e. whether ADR (non-shipping regulations)⁵⁰ or the IMDG Code,⁵¹ the shipper or the land carrier may adhere to in checking, packing, stowing and carrying the containers. The potential adherence to safety standards other than the widely used international safety code,⁵² i.e. the IMDG Code, might result not only in damage to the cargo inside the container but may also affect the vessel's seaworthiness.

Paragraph 1.4.3.4(b) of ADR states that the 'operator'⁵³ who is involved in handling a tank-container shall maintain the shells (the outer structure of the tank container) and their equipment so as to satisfy the requirements under ADR. Further, paragraph 1.4.2.2(c) of ADR requires the carrier to "*ascertain visually that the vehicles and loads have no obvious defects, leakages or cracks, missing equipment etc.*" One may presume that these regulations produce a

⁴⁹ See Clarke, A., 'Containers: Proof that Damage to Goods Occurred during Carriage', cited at Chapter 4 in Schmitthoff, C. and Goode, R (ed.). *International carriage of goods: some legal problems and possible solutions* (Centre of Commercial Law Studies, 1988), p.81.

⁵⁰ The ADR agreements allow dangerous goods travelling by road through more than one country to be exempted from the domestic legislation in force in those countries provided that the requirements of ADR are met in full. However, ADR does not contain provisions for enforcement and therefore, where a vehicle travelling under ADR does not comply in full, the vehicle becomes subject to domestic requirements. Such enforcement action would be framed in the terms of the relevant domestic regulations rather than a higher international standard. See <http://www.hse.gov.uk/cdg/manual/regenvirment.htm#adr>.

⁵¹ The IMDG Code contains internationally agreed guidance on the safe transport of dangerous goods by sea and most commonly relates to the carriage of dangerous goods in freight containers and tank containers.

⁵² See *Northern Shipping Co v Deutsche Seereederei GmbH (The Kapitän Sakharov)* [2000] 2 Lloyd's Rep. 255, CA, where Auld LJ stated that "*compliance with codes like MOPOG [the Russian domestic regulations for carrying dangerous container] is not necessarily determinative of the issue of due diligence.*"

⁵³ 'Tank-container operator' means any enterprise (i.e. person whether legal or natural) in whose name the tank-container is registered. See Chapter 1.2 of ADR.

standard of checking but whether such regulations purport a standard similar to that required by the IMDG Code is questionable. The shipping industry regulations may apply to the inland operator/carrier, if the contracting sea carrier is in control of the entire carriage, to check and maintain the tank-container (as required by ADR) during the inland transit. However, there is no scientific paper or academic opinion that demonstrates whether ADR safety regulations provide a standard of safety similar to the recommendations in the shipping industry regulations. Thus, at least to some extent it would seem likely that, on principle, the operator, carrier or other persons who are involved in handling and transporting the dangerous goods container when using ADR regulations may not provide a standard of care similar to the recommended regime under the IMDG Code.⁵⁴ If this proposition is true, the standard of care applied during the inland carriage may result in the container being rendered unfit for sea carriage. In other words, the care taken during inland carriage will be assessed by the court by reference to the standard set by ADR.⁵⁵ Accordingly, if an inland carrier carried dangerous cargo inside a container over which he has exercised care during the inland carriage according to the standard set by ADR but the cargo was still damaged, where the standard of care under ADR is less than that required by the shipping industry regulations, the carrier will still be liable.

⁵⁴ This may have an impact on the liability of the cargo owner. For instance, if the standard of care and the requirements for checking a container are lower than the international standard recommended by the shipping industry, the court may accept the standard of care recommended by ADR. As a result, the carrier might not be rendered liable for a standard of care lower than that imposed by the shipping regulations. See, Clarke, M., *International Carriage of Goods by Road: CMR*, (LLP, 2013), f.n. 93, at para. 73, stating that: “ADR is concerned not with liability between parties to the contract of carriage but with the regulation of the mode of carriage and its documentation, reinforced by the criminal law.”

⁵⁵ See, Clarke, M., *International Carriage of Goods by Road: CMR*, (LLP, 2013), at para. 73.

However, the standard of care during the inland carriage will be similar to the standard under the shipping industry regulations if the contracting sea carrier is in control of the whole operation. The sea carrier should ensure that the subcontracting land carrier complies with the rules relevant to the sea carriage leg during the whole carriage.

If the standard of care referred to in respect of the carriage of dangerous goods in a tank-container/container in both ADR and the IMDG Code is similar, problems may still arise during the sea carriage leg due to the lack of harmonisation amongst the safety regulations.⁵⁶ Paragraph 1.1.4.2.1 of ADR provides that if the carriage is in a transport chain that includes maritime carriage, the containers, tank-container, packing, marking and labelling of a container do not need to meet the regulations in ADR but meet the regulations in the IMDG Code, then they will be accepted for carriage.⁵⁷ This demonstrates that containers will not necessarily be in conformity with the IMDG Code if the containers are transported in a chain including maritime carriage, even if the containers, their labelling and marking are in conformity with ADR. This might result from a situation where the containers, labelling and marking are not in conformity with the IMDG Code, as the provisions relating to the marking, labelling etc. under ADR have been misinterpreted, especially where they are different from those in the IMDG Code. This would give rise to particular

⁵⁶ See, Clark, R., "Focus on..." (01 2002) MRI at p.1. *"It has been acknowledged in the shipping industry that incidents and problems encountered in the shipment of dangerous goods could be traced, to some extent, to a lack of harmonisation amongst the international safety regimes of ADR and IMDG Code. The problems are largely identified as largely shipper-based."*

⁵⁷ Paragraph 1.1.4.2.1 concerning 'carriage in a transport chain including maritime or air carriage' states that: *"Packages, containers, portable tanks and tank-containers, which do not entirely meet the requirements for packing, mixed packing, marking, labelling of packages or placarding and orange plate marking, of ADR, but are in conformity with the requirements of the IMDG Code or the ICAO Technical Instructions shall be accepted for carriage in a transport chain including maritime or air carriage subject to...the marking and labelling in accordance with requirements of the IMDG Code or ICAO Technical Instructions"*.

problems for the sea carriage leg. For instance, if a container was labelled in accordance with ADR regulations and then loaded on board a vessel, the master, the crew and the persons who plan for stowage of the containers might not be familiar with the labelling or marking, as they have only been trained to handle containers that were packed and labelled according to the shipping industry regulations. If the crew are not familiar with the requirements under ADR, the crew might not properly stow the container of dangerous cargo in accordance with the regulations of the IMDG Code. If the dangerous goods are stowed in the wrong location, e.g. near to a source of heat, this might result in an explosion or fire.⁵⁸

Even if the stowage plan was arranged in accordance with the regulations of the IMDG Code, difficulties may arise in the case of an emergency. For instance, if a container that was labelled, marked and packed in accordance with ADR and stowed on board the vessel in accordance with the IMDG Code, but during the voyage a leak or fire emerged from the container, there will be difficulties for the crew to operate the emergency procedures for this particular container, which contains dangerous cargo. During an emergency, there might not be time to refer to the container documentation or packing and marking certificates, assuming that the crew managed to construe the labelling and the dangerousness of the cargo correctly. The crew might eliminate danger by using the nearest fire extinguisher to the container in an effort to put the fire out. There are several types of fire extinguisher for different types of fire, e.g. gas leak fires and electrical fires. Accordingly, the crew, who are unfamiliar with the marking posted on the side of the container, which reflects the type of

⁵⁸ See *Northern Shipping Co. v Deutsche Seereederei GmbH (The Kapitan Sakharov)* [2000] 2 Lloyd's Rep. 255.

dangerous goods inside the container, will not know the type of danger they are dealing with and may use the wrong fire extinguisher. This is likely to result in the fire spreading or an explosion. This problem may be solved by extending the obligation of exercising due diligence in respect of the container to the entire inland carriage and not merely to the sea carriage leg, so that the standard of care and labelling requirements etc. are applicable to the entire transit. At the very least, before loading the container into the ship, the container should be labelled and deemed fit in accordance with the applicable maritime regulations, e.g. the IMDG Code.⁵⁹ This is not difficult to achieve as paragraph 1.1.4.2 of ADR permits regulations regarding the carriage of containers in the IMDG Code to override the regulations under ADR when the carriage of containers in a transport chain includes sea carriage.⁶⁰

Accordingly, if the obligations of supplying a fit container were applicable to the land carriage, the shipper or land carrier would then be instructed and obliged to use the appropriate safety standards in the international regulations, e.g. the IMDG Code, for the particular cargo. This would naturally reduce the likelihood of an incident of unseaworthiness during the sea carriage caused by the container's unfitness.⁶¹ In short, an imposition of a similar obligation during the land carriage leg would minimise the likelihood of an incident caused by unseaworthiness and would assist in overcoming the problems of performance

⁵⁹ Schelin, J., 'Obligations of the Shipper to the Carrier', cited as Chapter 7 in von Ziegler, A. et al. (eds.), *The Rotterdam Rules 2008 - Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Wolters Kluwer, 2010), at p.158.

⁶⁰ This is only possible if the sea carrier ensured that the shipping industry standards, e.g. the IMDG Code, are observed during the entire carriage. This may be possible if the sea carrier included such regulations and standards in his contract with the inland carrier.

⁶¹ See *Northern Shipping Co v Deutsche Seereederei GmbH (The Kapitan Sakharov)* [2000] 2 Lloyd's Rep. 255.

by land carriers at the lower standard imposed by less strict regulations.⁶² For instance, a court would likely assess the land carrier's exercise of care over containerised goods by reference to ADR standards.⁶³ One can argue that there is no need to impose a cargoworthiness obligation on the land carrier prior to the sea leg, as general liability provisions of other regulations impose a duty of care over the containerised cargo, e.g. Article 17 of the CMR. However, such an approach does not address the practical issue where the container's unfitness may be a problem during the sea carriage leg but not during the land carriage leg. It is submitted that due diligence to render a container cargoworthy and seaworthy should be exercised during the land leg as well, as this stage may be the only time where a sea carrier could react and prevent the container's unfitness that may in turn threaten the vessel's safety and jeopardise the voyage.⁶⁴ This is especially true where the sea carrier has no means of keeping or restoring the vessel's seaworthiness during the sea carriage.⁶⁵ This would be contrary to the new obligation of exercising due diligence to 'keep' the container cargoworthy during the voyage. Therefore, imposing an obligation of due diligence as regards cargoworthiness for the land leg may essentially mean exercising a different standard of care in checking and maintaining the container

⁶² One should note that dangerous goods are not defined in international inland transport conventions, i.e. CMR. If a similar obligation of due diligence is not imposed during the land carriage leg, the land carrier, will not, for example, be subject to the international law requirements for the carriage of dangerous goods. Therefore, land carriers will be using ADR, which offers a non-exhaustive list of dangerous goods. See Clarke, M. and Yates, D., *Contracts of Carriage by Land and Air*, (1st ed., 2005), para. 1.138.

⁶³ Clarke, M., *International Carriage of Goods by Road: CMR*, (2009, 5th ed.), para. 73. Also, the same author concludes that one should bear in mind that ADR is concerned not with liability between parties to a contract of carriage, but with regulation of the mode of carriage and its documentation, reinforced by criminal law (therefore, the defendant of the inland carriage might be relieved from liability on the basis of such argument).

⁶⁴ See the standard of due diligence exercised in respect of containers.

⁶⁵ It is well established that not all defects endangering the safety of the vessel can be remedied during the voyage. See *Ingram and Royale Ltd v Services Maritimes du Treport Ltd* [1913] 1 K.B. 538, p.543, per Scrutton J.

during the land carriage⁶⁶ and, by having the sea carriage in mind, the carrier would be encouraged to refuse loading a container that could potentially threaten the vessel's safety.

5.4.2 Implications of Extending the Obligation of Container Seaworthiness to Inland Carriage

It is debatable whether the heading of Article 14, 'voyage by sea', has confined the obligation of seaworthiness to the sea leg only, even though the Rules are intended to cover any door-to-door operations within the scope of the carriage contract, including e.g. inland carriage.⁶⁷ One cannot see any sensible reason for not extending the obligation of supplying a fit container to the inland carriage leg. Extending the responsibility of container seaworthiness to inland carriage would not be difficult in light of the current law (Hague/Hague-Visby Rules) as regards the duty of seaworthiness. It is well established that the carrier is responsible for the vessel's seaworthiness once it comes within 'his orbit'.⁶⁸ By analogy, a container supplied by the sea carrier, even if the containers are located far away from the vessel, e.g. during the stuffing stage, would already be within the supplier's/carrier's 'orbit' and consequently, one would suggest the

⁶⁶ *Zim Israel Navigation Ltd v The Israeli Phoenix Assurance Company Ltd (The 'Zim-Marseilles')* [1999] ETL 535, pp. 547-548 (Supr. C. of Israel). The district court had held that the standard of examination was not sufficient for the shipowner to discharge his obligation. The containers had not been inspected individually, even though it was known that the containers suffered from manufacturing defects and had undergone repairs, and, just prior to loading, were subjected to some strengthening repair. However, the court found that the repair and the standard of inspection of the defects were inadequate. It should be noted that Israeli law (as well as American, French and Dutch law) imposes the obligation of providing a cargoworthy container under the obligation of exercising due diligence to provide a seaworthy vessel, i.e. Hague/Hague-Visby Rules.

⁶⁷ Article 1 provides that the 'contract of carriage' shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.

⁶⁸ *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1960] 1 Q. B. 536 (CA).

imposition of a duty to exercise due diligence to provide a cargoworthy container during the land leg for that sea carrier who supplies his own container.⁶⁹ As a consequence, the due diligence requirement would impose a clearer obligation on the sea carrier who would then contract with the land carrier on the understanding that the land carrier would also exercise due diligence, as opposed to only providing for a duty of care over the cargo.⁷⁰ It should be stressed that the obligation of supplying a fit container is only imposed on the sea carrier where he is the supplier of the container and it might be sensible to impose the same obligation on the inland carrier. In other words, the sea carrier who supplied the container should exercise due diligence to make sure that his container is fit to carry the contracted cargo by ensuring that the structural strength, integrity, door gaskets, machineries (if the container is equipped with such), fittings (if it is a tank-container) and the internal cleanliness of the container is sound. The inland carrier, perhaps, should,⁷¹ through the extended duty, ensure that the soundness of the container's structural fitness is maintained throughout the inland carriage. It seems that, in principle, such an obligation (under the Rotterdam Rules) should be imposed on the inland carrier regardless of whether the container is supplied by (or on behalf of) the sea carrier. Thus, the inland carrier who transports the container to the load port

⁶⁹ See *Northern Shipping Co. v Deutsche Seereederei GmbH (The Kapitan Sakharov)* [2000] 2 Lloyd's Rep. 255.

⁷⁰ The non-delegable duty of seaworthiness would still be applicable when the land carrier is carrying the subject container and if he exercises a lesser standard of care, the sea carrier would be liable for any loss that results. See *Riverstone Meat Co. Pty Ltd v Lancashire Shipping Co. Ltd (The Muncaster Castle)* [1961] A.C. 807. This approach would not conflict with the other provisions of the Rotterdam Rules. The land carrier cannot be sued directly as he is not a 'maritime performing party'.

⁷¹ It can be agreed whether the stuffing and lashing of the cargo inside the container it is dealt with by the sea or land carrier. There may be a scenario where the sea carrier who supplied the container and therefore knows the internal condition of his container, leaves the stuffing to be carried out by the shipper, as he is loading cargo that requires specific lashing and stowing that only the shipper can carry out, provided that such stuffing and lashing does not render the container unfit.

should, for the entire inland carriage, care for and inspect the external structure of the container for any visual defect, crack or leakage. Where a defect is spotted, the inland carrier, depending on the circumstances of the case, should seek a substitute container or fix the defect and notify the sea carrier of the damage. This might be the case under the current law. In a nut shell, the standard of care extended to the land carrier should not be lower than the standard of due diligence in keeping the container fit during the land carriage.

Article 1(7) of the Rotterdam Rules refers to a 'maritime performing party'. This is a performing party,⁷² e.g. an independent contractor, who performs or undertakes to perform the carrier's obligations during the port-to-port carriage.⁷³ This includes the inland carrier but only if he performs or undertakes to perform his services within the limits of the port. Pursuant to Article 19,⁷⁴ a maritime

⁷² 'Performing party' means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that a person acts, either, directly or indirectly, at the carrier's request or under the carrier's supervision or control.

⁷³ Sturley, M., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly*, (Thomson Reuters, 2010). It is stated that: "As a general rule, everyone that performs the carrier's obligations from the initial port of loading until the final port of discharge qualifies as a maritime performing party" at para. 5.158.

⁷⁴ Article 19. Liability of maritime performing parties:

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and (b) The occurrence that caused the loss, damage or delay took place:

(i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

performing party is subject to the same rights, immunities, obligations (including the obligation of seaworthiness under Article 14(a)-(c))⁷⁵ and liabilities, as those imposed on the carrier under the Rotterdam Rules at the time when he has custody over the goods or when he is performing the carrier's obligations contemplated in the contract of carriage.⁷⁶ Article 19 facilitates direct claims against maritime performing parties in spite of the cargo-claimant having no contractual relationship with such parties.⁷⁷ If the exercise of due diligence is not imposed on the maritime performing party prior to shipment, the cargo-claimant will not be able to seek an indemnity from the maritime performing party who was responsible for the safe transport of containers within the port, even though his negligence has resulted in the container becoming defective. Take for an example, a maritime performing party who acts as an inland water carrier and is responsible for supplying transport containers from the jetty to the ocean going ship within the port.⁷⁸ Through the maritime performing party's negligence in handling one of the containers, it has become defective as a result of the heavy overloaded stack from the top containers.⁷⁹ Consequently,

4. *Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.*

⁷⁵ Article 79(1) reads: "unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it: (a) Directly or indirectly excludes or limits the obligation of the carrier or a maritime performing party under this Convention; (b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention." See Baatz, Y., *The Rotterdam Rules: A Practical Annotation*, (Informa, 2009), who states that Article 79 "makes no reference to the loss of or damage to the cargo, but rather to 'the obligations' - that is all obligations - imposed on the carrier by the Convention as a whole," at para. 79.03.

⁷⁶ Baughen, S., *Shipping Law*, (Routledge, 2012), at p.144-145.

⁷⁷ Baatz, Y., *The Rotterdam Rules: A Practical Annotation*, (Informa, 2009), para. 19.01, 19.04. It is noted that the Rotterdam Rules do not create liability against performing parties, but only against maritime performing parties. However, the carrier's liability covers actions by all performing parties whether maritime or not.

⁷⁸ The CMR Convention is irrelevant to this example but it could be relevant if the CMR Convention is part of and enforced by the national law of the country where loading is taking place.

⁷⁹ Assuming that the container was loaded inside the ship to prevent exposure to rain, the claimant may easily identify where the damage to the goods occurred, especially if it is known that it was raining heavily during loading.

the cargo is damaged by rain before the container was loaded onto the ocean-going ship. The maritime performing party did not take any corrective action to repair or replace the defective container, nor did it notify the ocean going carrier of the damage. If the obligation of container seaworthiness is not imposed prior to the loading of the container onto the ship – at the very least, during inland transport within the loading port – the cargo-claimant can only claim for damage that results from a defective container supplied by the sea carrier but not from the inland carrier who performs his duty within the loading port. If the sea carrier is insolvent and if the obligation of container seaworthiness is imposed on the maritime performing party during the period prior to the loading of the container onto the ship (i.e. within the port of loading), the claimant⁸⁰ may have an opportunity to recover his loss from the maritime performing party.

Much of Article 14 would be curtailed if due diligence is not required to be exercised prior to the container's loading; its purpose is to extend the obligations of the carrier to the entire voyage(s), including the inland voyage.⁸¹

By imposing more responsibility at an early stage, i.e. during the inland carriage, and by extending the obligation of keeping the container fit to the inland carrier, shipping industry regulations, such as the IMDG Code, would also be imposed on the inland carrier. Thus, the extension of the obligation to the inland carrier would help ensure that the container remains fit and possibly reduce problems related to container unfitness that may emerge during the voyage, especially if

⁸⁰ Or it might be difficult and more expensive to sue the foreign sea carrier.

⁸¹ To the contrary, the purpose of an ongoing seaworthiness obligation would be defeated in situations where a container's defect would be discoverable by using only the international standards but could only be cured while the container was still on land.

such problems are difficult to resolve.⁸² The benefit in extending to the land carrier a standard similar to, or not less than, due diligence in keeping the container seaworthy may help in discovering any unfitness during the inland carriage and prior to its loading on the vessel. It might be the case that the Rotterdam Rules do not extend the duty (in relation to the fitness of a container) to the land carrier unless the sea carrier requires, under the contract, that the inland carriage, for example, conforms with the IMDG Code regulations, so as to ensure that parallel requirements are imposed for land and sea carriage.

One of the controversial aspects of the Rotterdam Rules has been their applicability to the entire contract of carriage including land carriage preceding the loading of the vessel.⁸³ Therefore, extending the scope of the obligation to exercise due diligence in providing a cargoworthy container to the land carriage leg, as suggested above, might conflict with other inland transport conventions.⁸⁴ These issues will be discussed in the next section.

⁸² As there is not much that can be done to keep the container fit in accordance with Article 14(c) where a defective condition of the container emerges during the voyage. See f.n. 127, at p.363.

⁸³ In contrast with the Hague/Hague-Visby Rules and the “tackle-to-tackle” scope of Article 1(e) HVR, the application of the Rotterdam Rules is defined by the contract of carriage itself pursuant to the definition of the contract of carriage in Article 1(1) of the Rotterdam Rules. However, if the contract refers only to the maritime leg of a multimodal movement, then it is only that leg that the Rotterdam Rules cover.

⁸⁴ However, the absence of an express provision in Article 26 to exclude provisions which ‘indirectly affect the liability’ of the sea carrier is likely to give rise to differing interpretations; see Tetley, W., ‘Reform of carriage of goods - The UNCITRAL Draft & Senate COGSA’99. Let’s have a two-track approach’, (2003) 28 Tul. Mar. L. J. 1-114; it appears that tribunals and courts will differ in opinion as to which provisions of each convention prevail over the provisions of the Rotterdam Rules; this might lead to potential uncertainty in practice. See Diamond, A., ‘The Next Sea Carriage Convention’, (2008) LMCLQ, 135, p.145; Hancock, C., ‘Multimodal transport under the Convention’ cited as Chapter 2 in Thomas, R., *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Lawtext Publishing Limited, 2009), p.45.

5.4.3 Potential Conflicts as regards the Standard of Liability

There may be a reason for limiting the scope of the obligation to provide a cargoworthy container to the sea carriage leg only. Arguably, this could lead to the avoidance of potential problems in relation to the standard of liability under other inland transport conventions. An example is the CMR Convention. Where loss, damage or delay occurs during road transit, Article 26 of the Rotterdam Rules allows for the relevant provisions of an applicable international convention, e.g. Articles 17 and 18 of the CMR, which govern liability, limitation of liability and time for suit, to prevail over the Rules (provided that the CMR would have applied if a separate contract had been made between the carrier and the shipper in respect of the carriage). The CMR Convention, as well as other inland conventions,⁸⁵ provide, in principle, stricter liability but not absolute liability,⁸⁶ and differ on the defences which the carrier may plead. Assuming the application of Article 14(c) of the Rotterdam Rules, the liability for an unfit container arguably creates a new difficulty; the container operator may be alleged liable by virtue of Article 26 of the Rotterdam Rules for goods carried in a container which are lost, damaged or delayed as this would pertain to *'carriage preceding or subsequent to sea carriage'*.⁸⁷ The international transport conventions are a patchwork of regimes that could apply in relation to various

⁸⁵ Additionally, the Warsaw Convention and CIM Convention. A conclusion can be drawn that unimodal conventions have much the same standard of liability. See Kindred, H. M. and Brooks, M. R., *Multimodal Transport Rules*, (Kluwer Law International, 1st ed., 1997), p.80.

⁸⁶ This means that the carrier is not responsible for everything that happened to the goods in the course of the carriage. Certain risks are outside his responsibility, such as 'unavoidable circumstances'.

⁸⁷ In other words, the international transport conventions applicable to the different (albeit unimodal) transport modes vary significantly in their provisions, e.g. from the central liability provisions relating to the carrier's liability, to the exclusion or limits of liability and the requisite time for suit. In such circumstances, if under a hypothetical 'separate and direct contract with the carrier in respect of the particular stage of carriage', the carrier's liability would have been regulated by some other mandatory international instrument, the provisions of the Rotterdam Rules are to yield to that other instrument. See Diamond, A. 'The Rotterdam Rules', (2009) 4 LMCLQ 445, p.456.

potential claims,⁸⁸ including provisions that have an indirect impact on the carrier's liability for unseaworthiness, even though such liability is unique to sea carriage conventions.⁸⁹ In such circumstances, the Rotterdam Rules give way to the general system of liability provided by other transport conventions, where the majority of their provisions impose stricter liability with 'special risks' that act as limits on the carrier's liability. Further, Article 18(1) of the CMR provides that the burden of proof rests on the carrier to show that the loss, damage or delay falls within the exemptions provided by Article 17(2). Thus, the carrier, under the CMR, is liable for loss of the goods while they are in his charge unless he proves that he was unable to avoid the incident by virtue of the unfitness of the container or to avert the consequences of such unfitness.⁹⁰ The Rotterdam Rules, however, as explained in Chapter Three, are essentially a fault-based regime⁹¹ with other stipulated defences,⁹² which means that the carrier would be held (fully or partially) liable only where he did not exercise due diligence to provide a cargoworthy container.⁹³

It has already been proposed during a meeting of the Working Group of the Rules⁹⁴ and elsewhere⁹⁵ that provisions in other transport conventions, which

⁸⁸ UNCTAD/SDTE/TLB/4 *United Nations Conference on Trade and Development - Commentary by UNCTAD Secretariat on Draft Instrument on Transport Law* 13 March, 2002, p. 19.

⁸⁹ Cf. van der Ziel, G., 'Multimodal Aspects of the Rotterdam Rules', (2009) 4 *Uni. L. Rev.*, pp. 981-995, p.984.

⁹⁰ See Kindred, H. M. and Brooks, M. R., *Multimodal Transport Rules*, (Kluwer Law International, 1997), p.76; Glass, D. A. and Cashmore, C., *Introduction to the Law of Carriage of Goods* (Sweet & Maxwell, 1989), pp.106, 110-113; Theunis, J. (ed.), *International Carriage of Goods by Road (CMR)*, (Lloyd's of London Press, 1987), p.80-85.

⁹¹ Articles 17(1), 17(2).

⁹² Article 17(3).

⁹³ Some authors use the word 'negligence' instead of the expression 'lack of exercising due diligence'. See for example, Murray, C. et al., *Schmitthoff: The Law and Practice of International Trade* (Sweet & Maxwell, 12th ed., 2012), p.356.

⁹⁴ See the United Nations Commission on International Trade Law; Working Group III (Transport Law) Ninth session (NY, 15-26 April 2002); *Transport Law: Preliminary draft instrument on the carriage of goods by sea*, Note by the Secretariat, A/CN.9/WG.III/WP.21, para. 52, comments on Article 4.2.1. It was stated that the "[p]rovisions in other conventions that may indirectly affect

may merely indirectly affect liability, do not supersede the provisions of the Rotterdam Rules and that Article 14 continues to apply, as it will not be in direct conflict with any provisions of other international inland transport instruments.⁹⁶ It should not be overlooked that the obligation of cargoworthiness is measured by the exercise of due diligence, as opposed to the obligations under the central liability provisions of other inland transport conventions. The proposed contention, nevertheless, does not consider the potential interplay of such indirect conflicts and disregards the close interrelationship between, on the one hand,⁹⁷ the carrier's obligations of providing a cargoworthy container, and on the other, his liability.⁹⁸ Taking the hypothetical example of cargo damage as a result of the unfitness of a container where the damage was determined to have occurred during the land transport, by virtue of Article 26 of the Rotterdam

liability, such as jurisdiction provisions or notice of loss, should not supersede the Rotterdam Rules."

⁹⁵ Rasmussen U., 'Additional Provisions Relating to Particular Stages of Carriage' cited as Chapter 6 in von Ziegler, A. (ed.), *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Wolters Kluwer, 2010), p.147, stating that Article 14 of the Rotterdam Rules is not affected by Article 26; van der Ziel, G. 'Multimodal Aspects of the Rotterdam Rules', (2009) 4 *Uni. L. Rev.*, pp.981-995, p.984, stating that the provisions which prevail must be directly related to liability. Therefore, the provisions on limitation of liability and time for suit are included, but all provisions that may have an indirect impact on carrier liability are excluded. Cf. Sturley, M. et al. (ed.), *The Rotterdam Rules - The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomas Reuters, 2010), at para.5.020, at f.n. 58, suggesting that the approach followed is entirely opposite to that of the rest of scholars. It was stated that when the 'limited network' principle requires the carrier liability to be determined according to the mandatory provisions of another international instrument (such as CMR or CIM-COTIF), those provisions rather than the specific provisions, i.e. Article 13(1), define the carrier's obligations.

⁹⁶ Berlingieri, F., 'Multimodal Aspects of the Rotterdam Rules', presented at a Colloquium on the Rotterdam Rules held on September 21, 2009, at p.8, cited at <http://www.rotterdamrules2009.com/cms/index.php?page=text-speakers-rotterdam-rules-2009>, expressing the notion that Article 14 encompasses specific obligations applicable to the voyage by sea.

⁹⁷ The differences in the transport systems were not considered to complement each other as regards coverage of claims. As a result, this would lessen the predictability of the carrier's liability, and the cargo-interest's indemnity respectively, with regard to claims arising out of an unseaworthy container. UNCTAD/SDTE/TLB/4, 'United Nations Conference on Trade and Development - Commentary by UNCTAD Secretariat on Draft Instrument on Transport Law', 13 March 2002, p. 19.

⁹⁸ The same proposition might apply to other duties of the carrier, e.g. under Article 13; see Nikaki, T., 'The Carrier's Duties under the Rotterdam Rules: Better the Devil You Know?' (2010) 35 *Tul. Mar. L. J.*, 1-44, p.39.

Rules, the CMR provisions would apply provided that the parties had entered a separate and direct contract for such inland carriage. As a result, the carrier's liability for the above damage would be dealt with by Articles 17⁹⁹ and 18¹⁰⁰ of the CMR. Furthermore, assuming that Article 14 is applicable to the land carriage (given the proposition that this Article does not compete with the provisions of the CMR), there is a strong possibility of misinterpreting the standard of seaworthiness required by the carrier.

Thus, following a claim for localised damage, Article 26, which gives way to the provisions on liability, limitations and time for suit of other inland transport conventions, might have an impact on the obligation of container cargoworthiness, due to the absence of provisions similar to the obligation of seaworthiness in those other conventions. It follows therefore that the application of general liability provisions of an applicable inland transport convention will demand a different (in a significant practical sense) degree of care in providing a fit container as opposed to the due diligence standard required under Article 14 of the Rotterdam Rules. A commentator has argued that this obliges the carrier to prove¹⁰¹ that the loss, damage or delay caused by the unseaworthiness of the container would have occurred without fault on his part, essentially strict liability.¹⁰² Another contends that proving proper care or

⁹⁹ Article 17 of the CMR reads: "1. The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery; 2. The carrier shall however be relieved of liability if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent."

¹⁰⁰ Article 18 of the CMR reads: "1. The burden of proving that loss, damage or delay was due to one of the causes specified in Article 17, paragraph 2, shall rest upon the carrier."

¹⁰¹ The burden of proof expressly lies with the carrier under Article 18(1), CMR.

¹⁰² Cf. Haak, K. F., *The liability of the carrier under the CMR* (The Hague, Stichting Vervoeradres, 1986), pp.123-125; Glass, D. A. and Cashmore, C., *Introduction to the Law of Carriage of Goods* (Sweet & Maxwell, 1989), pp.110-113.

diligence to provide a fit container would suffice to relieve the carrier from liability,¹⁰³ notwithstanding that the application of the liability articles of other transport conventions, for example, Articles 17 and 18 of the CMR, impose a different standard of care over the cargo than that of due diligence required under Article 14 of the Rotterdam Rules.¹⁰⁴

Whatever construction is adopted in respect of the standard of reasonable care over cargo required under the CMR or other inland transport conventions, the standard might possibly differ from that of due diligence. In respect of the above examples, one might easily identify the conflict in the interplay between Article 14 of the Rotterdam Rules when read in conjunction with Article 17(2) of the CMR. A potential implication of such an interplay is that Article 17(2) of the CMR, in light of Article 14 of the Rotterdam Rules, might be construed as requiring the carrier to provide a seaworthy container by exercising the same due diligence that is required to be exercised by a reasonable carrier. The net result of such a joint interpretation might demonstrate the application of the standard of liability, i.e. that benchmarked by due diligence, of the Rotterdam Rules to the other inland transportation instruments, even when the loss, damage or delay was localised at the transport stage in question.¹⁰⁵

Although there are no provisions in the Rotterdam Rules for dealing with the potential indirect problems mentioned above, the solution to this dilemma may

¹⁰³ Kindred H. M. and Brooks, M. R., *Multimodal Transport Rules*, (Kluwer Law International, 1997), p.76.

¹⁰⁴ See *J. J. Silber Ltd and Others v Islander Trucking Ltd* [1985] 2 Lloyd's Rep. 243, where Mustill J stated that if the drafters of the CMR intended to equalise the standard under the CMR with reasonable care, he could have borrowed 'due diligence' from the Hague/Hague-Visby Rules or could have used words such as 'care' or 'neglect', at p.247.

¹⁰⁵ It is readily apparent that such an outcome would be contrary to the intentions of the drafters of the Rules who, through the operation of Art. 26 selected the 'limited network' system in order to retain the incorporation of the other transport instruments. Further, such an outcome would defeat the purpose of Art. 26 in resolving the potential conflicts with other transportation instruments.

lie in the broad meaning of the provision. There is incentive, however, for an argument that the wording “*specifically provide for the carrier’s liability*” can be construed in such a way as to include all the duties inferred from the general liability rules.¹⁰⁶ Whether in such instances the problem relating to the exercise of due diligence in providing a seaworthy container would be solved, as the liability provisions of Article 14 will give way to the general liability provisions of the applicable international transport instruments, will depend upon the national court’s approach in construing this provision.

5.5 The Effect of Article 82 that deals with Localised/Unlocalised Damage on the Seaworthiness Obligation¹⁰⁷

- *What was the purpose behind drafting Article 82?*

Article 82 of the Rotterdam Rules gives priority to other transport conventions,¹⁰⁸ which conflict with the Rotterdam Rules.¹⁰⁹

The applicable convention will assess the actions or omissions of the contractual parties. For example, a carrier’s selection of the appropriate standard of care will certainly be based, in a great part, on its potential

¹⁰⁶ Nikaki, T., ‘The Carrier’s Duties under the Rotterdam Rules: Better the Devil You Know?’ (2010) 35 *Tul. Mar. L. J.*, 1-44, p.41.

¹⁰⁷ As mentioned above, Article 82 covers localised damage as well. However, we are concerned with unlocalised damage in this Chapter. It is out of the theme of this thesis to consider the wording of Article 82 in detail.

¹⁰⁸ When the damage is not localised, the general liability provisions still apply. Therefore, the Rotterdam Rules collide with the CMR in respect of which provisions of liability between the two competing conventions should apply. Further, in rail transport law, there are liability provisions dealing with unlocalised damage, regardless of whether another carriage convention, such as the Rotterdam Rules, is involved. This is found in URCIM Article 1(4) of the COTIF Convention. However, Rule 82 will apply to localised damage at sea, even if the provisions of the Rotterdam Rules conflict with another international convention.

¹⁰⁹ It must be noted that Article 82 refers merely to conventions already in force at the time the Rotterdam Rules came into force. Unlike Article 26, it is not limited. See van der Ziel, G., ‘Multimodal Aspects of the Rotterdam Rules’, (2009) 4 *Uni. L. Rev.*, p.985.

liability.¹¹⁰ One might say that the aforementioned international conventions are designed to govern the legal aspects of carriage other than ocean carriage, i.e. carriage by land, air or inland waterways. In this respect, a question may arise as to the required standard of care in comparison to the duty imposed under Article 14 of the Rotterdam Rules, or, as to the impact of the other international conventions on the duty of seaworthiness under Article 14 of the Rotterdam Rules.¹¹¹

5.6 The Standard of the Duty

The continuing duty imposed on the carrier to exercise due diligence before, at the beginning and throughout the whole voyage to provide a seaworthy vessel and seaworthy containers might raise issues in relation to the standard of care required under other international transport conventions when the Rotterdam Rules give way to such other conventions.¹¹² It is arguable that the standard of due diligence may be subject to alteration. This argument can be supported by two propositions. First, by applying the relevant provisions of other conventions, the requisite standard of due diligence to be exercised when providing a seaworthy vessel might be lessened as a result of the indirect impact of the residual duty of care provided expressly or by implication under the central

¹¹⁰ On the other hand, the shipper or the maritime performing party will be less motivated to insure the cargo if he knows that he will not be liable for loss.

¹¹¹ This point will be dealt with at a later stage. See Sturley, F., 'Transport Law for the twenty-first Century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules', in Thomas, R. (ed.), *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules* (Lawtext Publishing Limited, 2009), pp.1-33.

¹¹² The Rules will also give way to provisions on limitation of liability and time of suit.

liability provisions of another international transport convention.¹¹³ Secondly, and it is submitted more significantly, the applicable provisions of the CMNI Convention¹¹⁴ may expunge the seaworthiness duty required under Article 14, when the Rotterdam Rules regime governs the contract of carriage. It is worth discussing separately these potential implications.

5.6.1 The Cancellation of the Extended Seaworthiness Obligation

In the specific circumstances¹¹⁵ of combined sea and inland waterway carriage where no container trans-shipment takes place, the CMNI Convention provisions would be applicable to the entire contract of carriage including the international sea leg. Take, for instance, the example of container transportation with no intervening trans-shipment from Turkey to Hungary where the parties agreed on a single short sea voyage combined with a lengthier upriver voyage on the Danube and where the containerised cargo arrived at Hungary (a party to the CMNI Convention) in a damaged condition due to either the vessel's or the container's unfitness. The court in Hungary is allowed by virtue of Article

¹¹³ Clark, M., *International Carriage of Goods by Road: CMR*, (2009, 5th ed.), p.79; Clarke, M. & Yates, D., *Contracts of Carriage by Land and Air* (2008, 2nd ed.), at para. 2.291-2.307, 2.535, 3.591 (the latter publication includes the care of cargo).

¹¹⁴ The CMNI convention applies to contracts concerning the carriage of goods solely by inland waterways but it is also applicable if the purpose of the contract is the carriage of goods without trans-shipment, both on inland waterways and in waters where maritime regulations apply, unless a marine bill of lading has been issued in accordance with the maritime law applicable, or the distance to be travelled in waters to which maritime regulations apply is greater.

¹¹⁵ A State that is party to both the CMNI and the Rotterdam Rules could face a conflicting obligation to apply the provisions of both conventions at the same time, if conditions under Article 2(2) of the CMNI are fulfilled. Article 2(2) provides: "*This Convention is applicable if the purpose of the contract of carriage is the carriage of goods, without trans-shipment, both on inland waterways and in waters to which maritime regulations apply, under the conditions set out in paragraph 1, unless: (a) a maritime bill of lading has been issued in accordance with the maritime law applicable, or (b) the distance to be travelled in waters to which maritime regulations apply is greater.*"

82(d)¹¹⁶ to apply the provisions of the CMNI Convention¹¹⁷ instead of the Rotterdam Rules. Unlike some of the other international transport conventions, Article 3.3 of the CMNI Convention contains a provision which imposes an obligation on the carrier *‘to exercise due diligence to ensure the vessel is in a state to receive the cargo, is seaworthy and is manned and equipped as prescribed by the regulations in force and is furnished with the necessary national and international authorizations for the carriage of the goods in question.’*¹¹⁸

As seen in the previous chapter, this obligation of seaworthiness is in line with that imposed by the existing regime of the Hague/Hague-Visby Rules.¹¹⁹ One can therefore infer that the prevalence of Article 3.3 of the CMNI Convention over Article 14 of the Rotterdam Rules is to the effect that not only would the extended obligation of providing a seaworthy vessel be cancelled, but also that the container cargoworthiness requirement under Article 14(c) would be ruled out. The application of the CMNI Convention is also to the effect that the carrier of a chartered vessel is not liable for loss or damage caused by the vessel’s unseaworthiness as a result of a defect¹²⁰ provided that *‘such defects could not have been detected prior to the start of the voyage despite due diligence.’*¹²¹

¹¹⁶ Article 82(d) provides: “Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipments both by inland waterways and sea.”

¹¹⁷ This is because the distance of the river to be travelled is longer than the sea voyage.

¹¹⁸ Article 3.3 of the CMNI Convention.

¹¹⁹ See para 2.5, at p.89.

¹²⁰ Article 25.2(c).

¹²¹ Articles 3.2 and 25.2(c).

5.6.2 The Potential Impact on Container Cargoworthiness

As the obligation to exercise due diligence in providing a fit container under Article 3.3 of the CMNI Convention is not mentioned, a carrier will not be liable for unlocalised damage caused during a combined inland water and sea carriage voyage by the container's unfitness due to, for instance, lack of the container's water-tightness or defective refrigeration. In addition, Article 12(3) of the CMNI Convention provides that *'if the goods are placed in a container...and sealed by other persons than the carrier [i.e. a shipper] if their container or seals are damaged or broken when they reached the port of discharge, it shall be presumed that the loss or damage to the goods did not occur during carriage.'*

It has been submitted that the carrier's duties and liabilities are inseparable¹²²; the potential absence of a container cargoworthiness obligation might influence the actions taken by the carrier. A carrier's decision as to his adherence to the appropriate standard of due diligence will inevitably be based on the duties imposed and the consequent liabilities under the applicable legal regime. This would influence the carrier as to the precautions (in other words, the standard of care) to be taken, not merely before and at the beginning of the carriage but also during the carriage. Such precautions might extend to supplying the vessel with the spare parts or other equipment necessary to fix, for example, a container's defective gasket rubber sealant or refrigeration mechanism of a reefer container. The level of care required has an impact upon the carrier's potential liability for an uncargoworthy container, even upon the assumption that the relevant liability provisions of the CMNI Convention (Article 16(1)) would

¹²² Nikaki, T., 'The Carrier's Duties Under the Rotterdam Rules: Better the Devil You Know?', 35 (2010) TMLJ 1-44, p.41

have imposed a duty to provide a cargoworthy container. Even upon such an assumption, however, a carrier is not to be held liable for cargo damage¹²³ caused by a failure of, for example, the refrigeration mechanism of a reefer container, when *'the loss was due to circumstances which a diligent carrier could not have prevented and the consequences of which he could not have averted'*.¹²⁴ In such a case, the carrier would be diligent, even if he had not supplied the vessel with the tools or spare parts necessary to repair the defective container en route (at sea or inland waterway),¹²⁵ as this would not be within the ambit of his due diligence obligation under Article 3.3 of the CMNI Convention. The matter would be treated differently under the Rotterdam Rules, where the obligation of seaworthiness regarding the vessel and the container is ongoing. As mentioned in Chapter Two,¹²⁶ the ongoing obligation under the Rotterdam Rules might impose a duty of supplying extra or at least an adequate number of spare parts and the failure to do so may render the vessel unseaworthy on the basis that the carrier is unable to repair the defective refrigerated container that causes cargo damage during the voyage.

One might argue that the gap between the CMNI Convention and the Rotterdam Rules is small, as there is no management exception, such as Article IV, r.2(a) of the Hague/Hague-Visby Rules, so that damage to cargo that resulted from any failure in taking steps to resolve the defective condition of the container could still render the carrier liable. However, the standard of diligence

¹²³ Where the unfitness or failure of the refrigeration mechanism has caused cargo damage during both sea and inland water carriage or where the damage of the cargo is unlocalised.

¹²⁴ Article 16(1) of the CMNI Convention.

¹²⁵ Unlike loss or damage caused by the lack of the adjustment of the refrigerated container's controls, as this would be required by the customs of carriage of containerised cargo. The carrier in such a case would be liable due to inadequate care of cargo. See De Wit, R., *Multimodal Transport*, (1995, LLP), para.11.6.

¹²⁶ See discussion, para. 2.14.1, at pp.128 and 133.

expected from the carrier as regards the ongoing obligation of seaworthiness under the Rotterdam Rules is not similar to the standard of diligence expected from the carrier under the CMNI Convention. The carrier may not be able to take additional steps to resolve the defective condition of a container if the ship was not supplied with the necessary spare parts to effect the repair. For instance, if the provisions of the Rotterdam Rules give way to the provisions of the CMNI Convention, there will not be a continuous obligation of seaworthiness. For this reason, if the defective condition of a container that emerged during the voyage is repairable on board but such spare parts are not available, the duty usually imposed on the carrier by Article 3.3 of the CMNI Convention to take further steps, e.g. to pick up spare parts from an intermediate port, may not apply.¹²⁷ Even the absence of the management exclusion would not guarantee the fact that the carrier will be required (or at least encouraged) to act above and beyond the normal practice that is required under the obligations imposed on the carrier by the provisions of the CMNI Convention. The provisions of the CMNI Convention regarding the obligation and liability of seaworthiness do not equate to the ongoing obligation of due diligence where the carrier may be obliged to take further steps, depending on the circumstances of the care.¹²⁸ Alternatively, if the defect is unrepairable on board the ship, the ongoing due diligence obligation, if imposed, may require that the carrier discharges the container from the ship in order to seek a replacement container.

¹²⁷ Although it may be said that there is not much one can do with a defective container during the voyage. Note for instance a defective container that results from a failure to stack the containers properly. However, depending on the type of defect and the availability of spare parts, certain defects can be repaired on board, such as a defective refrigeration system of a reefer container. The ongoing obligation is one of due diligence as opposed to an absolute duty.

¹²⁸ Save for the situation explained above when picking up spare parts from an intermediate port.

5.6.3 The Potential Influence on the Vessel's Seaworthiness

As can be seen, the carrier cannot, under Article 3(3) of the CMNI Convention, be rendered liable for damage caused by the vessel's unseaworthiness *after* the commencement of the voyage. This is, of course, in direct contradiction to the position under the Rotterdam Rules where the carrier would have been held liable had the Rules applied to the carriage contract. Obviously, this would jeopardise the balance of fairness sought by the drafters of the Rotterdam Rules with the extension of the due diligence obligation and would leave the cargo-claimant uncompensated for his loss. The application of the CMNI Convention to a contract of carriage could possibly lead to a situation where, depending on the port of loading, two containers on board a vessel stowed next to each other might be subject to a different set of rules and, consequently, to a different finding as to the issue of the carrier's liability.¹²⁹

¹²⁹ The potential outcome above can be very succinctly illustrated by the following example. Two containerised cargoes are loaded at two different ports; ports A and B, with cargo A and B respectively, for discharge at port C. Both cargoes are subject to the same contract of carriage which combines sea and inland waterway carriage and does not involve trans-shipment. In the entire voyage from port A to port C, the sea leg is longer than the inland waterway leg, whereas for the entire voyage from port B to port C, the inland waterway leg is longer than the sea leg. The Rotterdam Rules would apply to the carriage of cargo A because the distance of the ocean carriage is longer than the inland waterway carriage (see Article 2(2) of the CMNI Convention), whereas the CMNI Convention would apply to cargo B because the transport distance of the ocean carriage is shorter than the distance of the inland waterway carriage. If the carrier has exercised the same degree of due diligence before and at the beginning of the voyage at both ports and yet both cargoes A and B sustained damage before arrival at port C due to the vessel's unseaworthiness, the carrier may be found liable for cargo A under the Rotterdam Rules due to the ongoing duty to exercise due diligence, whilst he will not be liable for cargo B as the liability for cargo B will be determined on the basis of the CMNI Convention, under which the carrier needs to exercise due diligence only before and at the beginning of the voyage. In accordance with Article 2(2), *"This Convention is applicable if the purpose of the contract of carriage is the carriage of goods, without trans-shipment, both on inland waterways and in*

5.7 The Potential Interpretation of the CMNI Convention

The language of Article 3.3 of the CMNI Convention has not yet been tested in court. However, it should be noted that Article 3.3 refers merely to '*regulations in force*'¹³⁰ as opposed to '*international*' regulations in force. The wording of Article 3.3 suggests that the reference to regulations in force is related to the manning and equipment of the ship rather than her seaworthiness, but, as explained in Chapter One (para.1.4.2-1.4.3), manning and equipment are two aspects of seaworthiness which, if inadequate or insufficient, will render the ship unseaworthy. Accordingly, the absence from Article 3.3 of the word '*international*' before the word '*regulations*'¹³¹ may cause interpretation difficulties as it may lead to an inference that the carrier is only obliged to adopt local or regional regulations governing the scope of seaworthiness (in relation to the ships' manning and equipment) for vessels¹³² designed to navigate only

waters to which maritime regulations apply, under the conditions set out in paragraph 1, unless: (a) a maritime bill of lading has been issued in accordance with the maritime law applicable, or (b) the distance to be travelled in waters to which maritime regulations apply is the greater."

¹³⁰ "[The carrier] shall be bound, before and at the beginning of the voyage, to exercise due diligence to ensure that, taking into account the goods to be carried, the vessel is in a state to receive the cargo, is seaworthy and is manned and equipped as prescribed by the regulations in force and is furnished with the necessary national and international authorisation for the carriage of the goods in question" (emphasis added).

¹³¹ It can be observed that the word '*international*' has been used later in the same Article (Article 3.3) in relation to the '*authorizations for the carriage of the goods in question.*' It is obvious that the word used in this context is for the purpose of having an adherence to an international system.

¹³² The sea stage of the carriage is described in the CMNI Convention as the distance travelled in waters to which the maritime water regulations apply. This point is debatable, because it is unclear whether this means maritime regulations concerning transport or traffic only, or whether it also includes international conventions of the shipping industry, such as SOLAS and STCW 95, etc. For instance, the relevant certificates of competency require that the crew serving on board an inland-sea going vessel to collaborate with either the European Commission or Danube and Rhine legislations. Minimum manning requirements, as well as working and rest hours of the crew in inland navigation, are compatible with Central Commission for Navigation on the Rhine (CCNR) rules.

through inland waterways and coastal (albeit sea) areas.¹³³ The justification for this notion has apparently been the existence of several regional regulations and national legislation, which have already been implemented by the industry.¹³⁴ A reason might be that the drafters of the CMNI Convention aimed not to disturb the existing regional and national framework with a view towards an international standard which, had they not done so, would arguably have created an obstacle to adopting the Convention. Further to that, the CMNI Convention reflects the recommendation of the inland-waterways industry in their effort to maintain their transport competitiveness amongst other inland modes of transportation, i.e. haulage.¹³⁵ The inland-waterways industry recommended that implementation of specific technical requirements rather than international requirements,¹³⁶ such as the IMO technical regulations, continued in order to lower the cost of this mode of transport.¹³⁷ As a result, the carrier is not required to adhere to international shipping regulations.

¹³³ In *Turnbull and others v Janson* (1877) 36 LT 635; (1877-1878) LR 3 CPD 264, the vessel was found to be unseaworthy when her preparation was inadequate to make her able to withstand the perils of the ocean.

¹³⁴ The *European Code for Inland Waterways (CEVNI)* was revised in 2002 and applies to all of Europe. CEVNI serves as a model for national and international (within river commissions) legislation relating to rules of the road, signalling on inland waterways, night and daytime marking of vessels, as well as waterway signs and marking. The *Recommendations on Minimum Manning Requirements and Working and Rest Hours of Crews of Vessels in Inland Navigation* were adopted in 2004. The Recommendations are compatible with relevant rules of CCNR and, at the same time, take into account national legislation of other UNECE member countries in this field. The Recommendations on limitation of exhaust and pollutant particulate emissions from diesel engines used on inland navigation vessels were adopted in 2004. They are compatible with both EU and CCNR provisions but not with SOLAS. The *Technical Requirements for Inland Navigation Vessels* are in line with the draft revised Directive 82/714/EEC, but not with MARPOL or SOLAS.

¹³⁵ Given, however, the importance of safety standards, the Recommendations of the industry should not be overstated as this would arguably delay or prevent market integration. See Reference document for the Council of Ministers containing conclusions of the seminars '*The inland waterways of tomorrow on the European continent*', held in Paris, 30 January 2002, CEMT/CM(2002)6, www.CEMT.org, p.7.

¹³⁶ See the recommendation proposed by the industry in Woehrling, J-M. 'Is the legal framework of European inland navigation suitably adapted?' cited as Chapter 1, Part II of the European Conference of Ministers of Transport, 'Strengthening inland waterway transport', at p.45.

¹³⁷ See Reference document for the Council of Ministers containing conclusions of the seminars: '*The inland waterways of tomorrow on the European continent*', held in Paris, 30 January 2002, CEMT/CM(2002)6, www.CEMT.org, at pp.4 and 7.

Accordingly, national courts will be required to examine a claim of unseaworthiness in light of obligations under the relevant national or regional regulations and the carrier will not be liable for non-compliance with international regulations.¹³⁸ Therefore, a court or tribunal might find the vessel to be seaworthy, even if the carrier acted on the basis of a lower standard of due diligence in comparison with the corresponding international standard. Consequently, the carrier will not be liable for damage or loss caused by the vessel's condition which, under the Rotterdam Rules, if applicable, would be considered to fall short of the standards required under the international shipping conventions; that is, damage or loss caused by unseaworthiness.

For instance, a river or coastal vessel not constructed in accordance with international shipping standards when sent to open sea or the ocean might be unable to withstand the sea or ocean conditions.¹³⁹ This may relate, for instance, to the river or coastal vessel's shell plate thickness, freeboard, reserve buoyancy, ability to withstand green seas on her deck, subdivision, floodable length and survivability and the like, which an open sea or ocean merchant vessel provides for in order to withstand the ordinary perils of the open sea.¹⁴⁰ Such a vessel would not usually be fit and able (at least to the same degree as

¹³⁸ The carrier might be adhering to local, regional or national regulations. Such was the case in *The Kapitan Sakharov* where the carrier was adhering to MOPOG, which is a Russian instrument similar to the IMDG Code. See, in general, Chapter Four on the 'effects of shipping standard on the obligation of seaworthiness'.

¹³⁹ Such a problem is likely to occur, as the word 'sea carriage' is not expressly defined by the Rotterdam Rules and is likely to confuse the parties where the phrase will be given a broad commercial interpretation covering ocean carriage and carriage over connected waters leading to and from ports and other loading/unloading terminals. As a result, the term 'sea carriage' might come into question as regards the boundaries between sea carriage and carriage by inland waterways, i.e. CMNI. See Thomas, R., 'The emergence and application of the Rotterdam Rules', cited as Chapter 1 in Thomas, R. (ed.), *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd's List, 2010), pp.7-8.

¹⁴⁰ The International Load Line Convention 1966 (LL 1966); See Alman, P., Clearly, W. A., Dyer, M. and Pauling, J., 'The International Load Line Convention: crossroads to the future' (Oct 1992), Vol. 29(4) Marine Technology. 233-248; *Lighter Loads*, (27 Oct., 1995) Lloyd's List.

an open sea vessel) to withstand the stresses of high winds and waves reasonably expected when sailing open seas and oceans.¹⁴¹ Therefore, the obligation of seaworthiness for such a vessel is confined solely to the perils expected during a journey within inland waterways and if the vessel is sent out to the open seas, she might be seaworthy for the purposes of the local regulations but not seaworthy for the purposes of carrying the particular cargo in the open seas.¹⁴² Sending a ship out to the open sea without compliance with international regulations might be possible, but one can argue that the obligation of seaworthiness under the CMNI Convention presumably takes into account the expected conditions of the contractual journey. Nevertheless, Article 3.3 of the CMNI Convention expressly states that when exercising due diligence, the carrier shall “*take into consideration the goods to be carried*” but nothing is mentioned regarding the condition of the contemplated contracted voyage. It might be the case that the CMNI Convention requires that the obligation of seaworthiness be tested against the conditions to be encountered during the contracted voyage, as is the case under the Hague/Hague-Visby Rules. If so, then much of the above discussion in this section will be redundant. It must be remembered that under the contract of carriage governed by the current regime, the carrier, when exercising due diligence, must take into consideration the preparation of the ship, staff and equipment as regards the potential conditions to be encountered during the voyage in relation to the international shipping industry regulations, e.g. SOLAS, STCW etc., as a benchmark. However, reference to equipment and manning in Article 3.3 of the

¹⁴¹ Boisson, P., *Safety at Sea: Policies, Regulations and International Law*, (Edition Bureau Veritas, 1999). See Section IV (Classification Standards), p.207.

¹⁴² In *Turnbull and others v Janson* (1877) 36 LT 635; (1877-1878) LR 3 CPD 264, the vessel was found to be unseaworthy when her preparation was not enough to make her able to withstand the perils of the ocean.

CMNI Convention is made to non-international regulations as opposed to international regulations.¹⁴³ That is to say, even if the carrier takes into consideration the conditions likely to be encountered during the contractual voyage, the preparation for such a voyage will be made in light of national or local regulations rather than international regulations. This might render the equipment or the standard of manning of the ship unfit for the open sea.

In conclusion, in circumstances such as those explained above, it seems that the change brought about by the application of other international conventions in general and the CMNI Convention in particular is likely to create an unfair balance for cargo-interests in terms of seaworthiness should the consequent obligations and liabilities of the carrier be lessened.

5.8 The Indirect Impact on Article 14: The Example of CMR

The current law, that is the Hague/Hague-Visby Rules, is limited to maritime carriage and the scope of application is limited to 'tackle-to-tackle' carriage.¹⁴⁴ Given that the Hague/Hague-Visby Rules do not refer to any special kind of multimodal carriage such as the reference, for example, made by Article 2 of CMR to activities outside their scope of application, i.e. the period before loading and after discharge, such activities are not covered. This limited scope of application has a particular impact on the carrier's potential liability following

¹⁴³ For instance, the inland carrier's care of the container and goods will be assessed by reference to the standard set by the ADR to which the court will refer. See, Clarke, M., *International Carriage of Goods by Road: CMR* (LLP, 2013), at para. 73. The same point was mentioned at paragraph 5.4.2, at p. 369.

¹⁴⁴ Article 10, Article 1(e) and Article 3(8) of the Hague/Hague-Visby Rules. A further reason for their limited scope is that HVR are applicable only when certain documents are issued, i.e. they do not apply unless a bill of lading or other similar document of title has been issued for the sea carriage.

a seaworthiness incident.¹⁴⁵ It creates gaps between the mandatory liability regimes applicable to the different stages of carriage. The Rotterdam Rules, a single liability regime covering potentially the whole period of the maritime and land/air/rail transport,¹⁴⁶ were intended to solve this problem and to create a system whereby the same set of rules are applicable to the other means of transport, provided that there is a sea leg where the rules will also be applicable.¹⁴⁷ However, there is an unresolved problem, as provisions in other transport conventions, such as CMR, which are unique in nature and make sense to the particular transport mode on general principles of construction, will not be applicable to the sea carriage leg and are therefore, disregarded.¹⁴⁸ For example, if the Hague Rules or the Rotterdam Rules (if ratified) are held to apply to the road leg of carriage, it is doubtful whether the provisions of Article III, rule 1 of the Hague/Hague-Visby Rules (or Article 14 of the Rotterdam Rules) could be applied to a lorry, in spite of Article III, rule 2 (or Article 13 of the Rotterdam Rules) being capable of adaptation (although Article IV, rule 2 of the Hague/Hague-Visby Rules, to which it is subject, is not).¹⁴⁹

By analogy, the overriding application of other international transport conventions raises the question as to whether their general liability provisions

¹⁴⁵ For a detailed discussion, see Hoeks, M., *Multimodal Transport Law - The law applicable to the multimodal contract for the carriage of goods*, (2009, Proefschriftmaken), pp.240-262.

¹⁴⁶ Door-to-door coverage does not automatically apply under the Rotterdam Rules. The applicable period of responsibility depends on the agreement within the contract, i.e. 'tackle-to-tackle', 'port-to-port', or 'door-to-door'.

¹⁴⁷ This section does not cover the conflicts created between the Hague/Hague-Visby Rules and other transport conventions. It is only intended to deal with the problems potentially created by the multimodal nature of the Rotterdam Rules, which, if left unaddressed, would potentially create problems as regards other transport conventions.

¹⁴⁸ See Glass, D. & Cashmore, G., *Introduction to the Law of Carriage of Goods*, (Sweet & Maxwell, 1989), p.106. CMR does not regulate every aspect of a carriage contract so some liabilities of a carrier may fall outside its scope. This might result in the application of national law, however, the situation under the Rotterdam Rules would differ because they do not allow national law to apply.

¹⁴⁹ It will be shown below that the package limitation in Article IV rule 5 and the time bar provision in Article III rule 6 are both always readily applicable.

could be applicable to a vessel's seaworthiness.¹⁵⁰ This would defeat the purpose of the necessary separation between the obligations relating to the care of the cargo and those relating to the seaworthiness of the vessel and her equipment. Such differentiation between the two obligations is important, even in relation to the application of other transport conventions by reference to the 'door-to-door' scope of application of the Rotterdam Rules.¹⁵¹

5.8.1 Standard of Checking the Fitness of the Container in Door-to-Door Carriage

The tendency is that the existing international transport conventions are seen to allow for the application of the carrier's duties to all modes of transport, i.e. either a vehicle, vessel, aircraft or rail wagon; modes that are used in the modern carriage of goods.

Indeed, if it is to be assumed that there is a seaworthiness duty imposed on the carrier, this would be upon the basis of general liability provisions which impose on the carrier a duty in relation to the goods, which would in turn impact upon the carrier's obligations in relation to the vessel.¹⁵² It goes without saying that the carrier's duty to provide an adequate and fit for carriage vessel and/or container will be inferred from the central liability provisions.¹⁵³ Thus, the liability

¹⁵⁰ Aikens, R. et al., *Bills of Lading*, (2006, 1st ed.) at para.11.67. Cf. Nikaki, T. 'The Carrier's Duties under the Rotterdam Rules: Better the Devil You Know?' (2010) 35 *Tul. Mar. L. J.*, 1-44, p.37, where reference was made to *Walek & Co.* [1980] 2 Lloyd's Rep. 279 (Q.B.). As this case does not cover carriage by sea, no analogy is given to the concept of seaworthiness.

¹⁵¹ Berlingieri F., 'Carrier's Obligation and Liabilities' - a paper delivered in Part II of The Work of the CMI (2007-2008) in Athens. Cited at <http://comitemaritime.org/Yearbook>.

¹⁵² Clarke, M., *International Carriage of Goods by Road: CMR* (2009, 5th ed.) para. 75f (i); Clarke, M. & Yates, D., *Contracts of Carriage by Land and Air* (Informa, 2nd ed., 2008), para. 1.98, 2.146, 2.291-2.307.

¹⁵³ Article 17 of the CMR Convention. Such a duty will be applied during the carrier's entire period of responsibility under the relevant convention and will be judged in the same manner as the duty of the carrier to care for the cargo.

for damaged cargo due to an unfit container is not clear,¹⁵⁴ but it can be inferred as Clarke states that *[c]ontainers and any other things which are neither vehicle nor special equipment but are provided by the carrier for the purpose of carriage, there is no special regime, if loss, damage or delay caused to the cargo by a defect in the container, the carrier will be liable under Article 17.1, unless the carrier can prove a defence under Article 17.2 [i.e. damage or delay was unavoidable].*¹⁵⁵ Where CMR applies, the standard of liability for an unfit container is not defined. The standard to be imposed may be that under the carrier's general duty of care,¹⁵⁶ which imposes a higher duty and thus different liability than the benchmarked of Article 14 of the Rotterdam Rules.

Generally, with regard to the Rotterdam Rules, the carrier is put on inquiry depending on the circumstances; for example, if there is a defect or a container is leaking, by exercising due diligence this would be visible to the carrier, suggesting that a repair or even a temporary repair must be carried out to avert damage to the cargo. In other words, the carrier is required to exercise due diligence in detecting a defect. As regards CMR, the duty of utmost care under CMR is said to be higher,¹⁵⁷ therefore the standard of checking the container under CMR is at the least similar to the standard under the Rotterdam Rules.¹⁵⁸

In light of the above, a question inevitably raised is whether it would be preferable for the Rotterdam Rules to regulate the obligation of providing a seaworthy vessel and the consequent liability for not doing so on a multimodal basis, as compared to the current unimodal regimes. Alternatively, the question

¹⁵⁴ The word 'container' is not mentioned in the CMR Convention.

¹⁵⁵ Clarke, M., *International Carriage of Goods by Road: CMR* (2009, 5th ed.), para. 75f(i).

¹⁵⁶ Clarke, M., *International Carriage of Goods by Road: CMR* (2009, 5th ed.), Ch.6, para. 75f(i).

¹⁵⁷ Clarke, M. et al, *Contracts of Carriage by Land and Air*, (Informa, 2008), at para. 1.5 and

1.98

¹⁵⁸ Cf. Article 40 of the Rotterdam Rules.

would be whether the desired improvement of the law in relation to the carrier's duty or obligation of providing a seaworthy vessel would be achieved by the Rotterdam Rules if the Rules were to cover merely the sea leg (port-to-port) or if they were to operate on a multimodal basis (door-to-door). The answer to the above questions might help address the issue as to whether it would be more logical and fair for the rights and liabilities consequent to the carrier's seaworthiness obligation under the carriage contract to be governed by the Rotterdam Rules and their scope of applicability enlarged so that they also embrace events of damage or loss occurring during transportation by modes other than the sea transport.

Do we really need the Rotterdam Rules as a uniform law to regulate the obligation of container cargoworthiness in a multimodal carriage contract?¹⁵⁹

The following section (paragraph 5.9) will address the above inquiry.

5.9 The Implication of the Rotterdam Rules on Unlocalised or Localised Containerised Cargo

5.9.1 Disregarding the Application of the Container Cargoworthiness Obligation

It should be noted that the extension of the scope of the Rotterdam Rules to inland carriage is not to the advantage of the cargo-interests where, by virtue of Articles 26 and 82 of the Rotterdam Rules, some other applicable international transport conventions through their liability or obligation provisions would rule

¹⁵⁹ At various instances, a question has been raised as to whether there is actually a need for a uniform law to regulate contracts of multimodal carriage. This, however, has not been discussed in the context of the obligation of seaworthiness or container cargoworthiness. See Faghfour, M., 'International Regulation of Liability for Multimodal Transport', *WMU of JMA* (2006), Vol.5, 95-114, at p. 95

out or reduce¹⁶⁰ the scope of the container cargoworthiness obligation to the period before or at the commencement of the vessel's sailing because the *'carriage by sea, particularly over long distance in the deep trade, is very different from carriage by land and is different also from carriage on the short sea trades... therefore, different basis of duties thus liability should not be applied to the sea transit.'*¹⁶¹

5.9.2 Trans-shipment: Not to the Benefit of the Cargo-interests?

Currently, contracts of carriage of goods by sea are mostly governed by the Hague/Hague-Visby Rules. When trans-shipment of a container at an intermediate port takes place, the container is left for a period at the trans-shipment port and is subsequently loaded onto another vessel for onward carriage to the final destination port. The Hague/Hague-Visby Rules will continue to govern the relationship of the contractual parties for the entire period including the period of the container's storage at the intervening port. One might think that there is no need for a 'new' 'door-to-door' regime because the Hague/Hague-Visby Rules could be, if the parties agreed, contractually applied to other modes of carriage despite the limiting words of Article I(e) and Article II.¹⁶² It should be noted in this respect, however, that *'on general principles of construction, provisions which are meaningless outside the context of the sea and which cannot be rendered meaningful by permissible verbal*

¹⁶⁰ See the above discussed points at para. 5.6, at p.358.

¹⁶¹ Selvig, E., 'The background to the convention', conference paper delivered at Multimodal Transport the 1980 U.N. Convention at Southampton University (12 September 1980) 1-15, at p.2; Melo, 'Replies of the Mexican Maritime Law Association' Containers, II, p.33; Wong, J. 'Container Transportation and Anomalies in the Law', 23 [1995] Aus. Bus. L. Rev., 340.

¹⁶² See *The OOCL Bravery* [2000] 1 Lloyd's Rep. 394.

*manipulation will be inapplicable and disregarded.*¹⁶³ Thus, for example, it is doubtful whether the provisions of Article III, r.1 could be applied to a lorry or container if the Hague/Hague-Visby Rules were to apply to a road transport leg. By analogy, the effect of the Rotterdam Rules is the same. Further, when damage or loss occurs during sea carriage or when it is unlocalised, with a 'door-to-door' contract of carriage, the precedence of other international transport conventions over the Rotterdam Rules has the same effect as the general principles of construction. This, effectively, means that provisions which are meaningless outside the context of the *inland carriage* and are incapable of being rendered meaningful will be inapplicable and disregarded. Arguably, therefore, the Rotterdam Rules, compared to the current system, have not solved problems occurring during multimodal carriage.

5.9.3 Limiting the Carrier's Liability: To the Benefit of the Carrier

Insofar as the seaworthiness obligation is concerned, the Rotterdam Rules strike a balance between the interests of the carrier and the cargo-interests. However, this balance may be disturbed if the scope of application of the Rotterdam Rules is to be extended to the inland carriage leg. For instance, if, under the contract, the carrier has agreed to carry containers through inland water and open sea without transshipment, the provisions of the CMNI Convention, in certain conditions explained above,¹⁶⁴ will apply instead of the provisions of the Rotterdam Rules. The provisions of the CMNI Convention, e.g. Article 3.3, do not provide an ongoing obligation of seaworthiness nor is any

¹⁶³ Aikens, R., *Bills of Lading* [2006] Informa, para. 11.67.

¹⁶⁴ See para. 5.6.1, at p.359.

obligation to provide a fit container imposed. As a result, the ongoing obligation of seaworthiness and the obligation of providing a fit container imposed where the Rotterdam Rules govern the contract, will now be cancelled. Consequently, the balance between the contractual parties will be disturbed and the carrier will not be liable even where he did not exercise due diligence in respect of a defect that emerged during the voyage, which in turn damaged the cargo.

The Rotterdam Rules may not be suitable for all types of carriage. Therefore, it is important to distinguish between the types of sea carriage, e.g. whether sea and inland carriage or only sea carriage.

On the one hand, there is carriage that is limited to 'port-to-port' or 'tackle-to-tackle', such as the carriage of bulk cargoes, where the Rotterdam Rules (with the extended doctrine of seaworthiness in contracts of carriage governed by them) may be seen as an improvement. On the other hand, there is containerised sea carriage or multimodal carriage, which may be extended to 'door-to-door', where the scope of the Rotterdam Rules might not be said to effectively improve the balance between the carrier and the cargo-interests. In order to achieve a better balance between the parties, some modifications are proposed. Apart from and in addition to such an imbalance, problems such as the increased cost of investigating the causes and circumstances of unlocalised loss and litigating the matter are to be expected.¹⁶⁵

5.10 Recommended Solutions

¹⁶⁵ Haak, K., 'The Harmonization of intermodal liability arrangements', (2005) 40 European Transport Law, 11-51, at p.18.

5.10.1 Recommendations to Modify Certain Provisions of the Rotterdam Rules

Contracts of carriage based on the international inland transport conventions do not contain a unique maritime obligation,¹⁶⁶ such as seaworthiness, so, as explained above, confusion may arise when the Rotterdam Rules give way to the provisions of the inland conventions. The confusion created may result in the seaworthiness obligation being excluded or limited and this may consequently impact upon the standard of care owed by the carrier. This is likely to occur when courts or arbitration tribunals take a different view as to which provisions of each convention are to take precedence over the Rotterdam Rules and to which party of the contract those provisions apply.¹⁶⁷ This concern may become even more serious when, under Article 82, the applicable convention takes precedence over the Rotterdam Rules, as in the example of Article 3.3 of the CMNI Convention given above, and the obligation of providing a seaworthy vessel is either derogated or ruled out. In order to avoid such confusion, it is suggested that an express provision be added to Article 82 to the effect that *'when the provisions of other conventions/instruments are applicable, a claim of seaworthiness must not be reduced to a standard below the minimum standard applicable under Article 14(a) and (c).'*

¹⁶⁶ Faber, D. and Diamond, A. (ed.), *Multimodal Transport: Avoiding Legal Problems* (Lloyd's of London, LLP, 1997), p.3; compare it with the opposing view of Francesco Berlingieri commenting that "...seaworthiness of the vessel should be made continuous, while the carrier in a door-to-door contract should not be allowed to exclude specified services from the scope of the contract"; Berlingieri, F., 'Basis of liability and exclusions of liability', [2002] LMCLQ 336, p.336; the same view was expressed during the International Sub-Committee on *Uniformity of the Law of Carriage of Goods by Sea (Uniformity ISC)* by the Delegation of Canada, France and Italy, CMI Yearbook 1995, p.186.

¹⁶⁷ UNCTAD/SDTE/TLB/4, 13 March 2002, '*UNCTAD Commentary on the Draft Instrument on Transport Law*', cited in www.unctad.org; Hoeks, M., *Maritime Plus and the European Status Quo: The current framework of international transport law, 'maritime plus' and the EU* (2010) Scandinavian Institute of Maritime Law Yearbook, 159-221, p.208.

A question which might arise would be as to whether it is possible to overcome the above problems by following the trend of other inland transport conventions; that is by providing a central, uniform liability provision.

5.10.1.1 A Central Liability Provision in All Modes of Carriage vs a Specific Seaworthiness Provision

One might be tempted to suggest¹⁶⁸ that in order to overcome the above problems, the Rotterdam Rules should follow the trend of other inland transport conventions and merely include a central liability provision.¹⁶⁹ Drafting a provision influenced by the language used in regimes of cargo carriage by air,¹⁷⁰ rail¹⁷¹ and road¹⁷² might seem proper for the purposes of creating a unified standard of care applicable to the carrier in multimodal cargo transportation.¹⁷³ However, such an approach would potentially create other problems. For instance, the use of language similar to that in the aforementioned conventions¹⁷⁴ is a move away from traditional maritime language,¹⁷⁵ which uses terms and concepts tested through history and clarified, particularised or exemplified by a vast body of case law in many jurisdictions, which may be used to interpret Article 14.

¹⁶⁸ Nikaki, T., 'The Carrier's Duties under the Rotterdam Rules: Better the Devil You Know?' (2010) 35 *Tul. Mar. L. J.*, pp.1-44, p.42.

¹⁶⁹ This approach of implied duties, which has not been tested extensively, was adopted by the Hamburg Rules. However, it did not receive extensive support.

¹⁷⁰ I.e. the Warsaw Convention. See Articles 18(1) and 20(1).

¹⁷¹ I.e. CMI Convention. See Articles 27(1) and (2).

¹⁷² CMR Convention. See Articles 17(1) and 17(2).

¹⁷³ Zamora, 'Carrier Liability for Damage or Loss to Cargo in International Transport', (1975) 23 *A. J. Comp. L.*, 391, at 395.

¹⁷⁴ I.e. CMI, CMR, Warsaw Convention. Or even similar to the model that is adopted in the Hamburg Rules, which has not received widespread support. It was previously explained that Article 14 of the Rotterdam Rules was based on the approach of Article III r.1 of the Hague/Hague-Visby Rules.

¹⁷⁵ That is used in the current law such as Article III r.1 of the Hague/Hague-Visby Rules.

It would appear, therefore, difficult to change the well-established practice of using specific legislative provisions. Furthermore, whilst the use of a uniform liability provision in all modes might seem to solve the problem of unifying the liability between the carrier and his sub-contractors, it would not completely eliminate the uncertainty or unpredictability of liability (though the use of the network system¹⁷⁶ does solve the problem).¹⁷⁷ This is because under a uniform liability provision scheme, the obligation of seaworthiness should be inferred on the basis of the uniform (central) liability provision. In such circumstances, however, there would probably be no assurance as to whether all the facets¹⁷⁸ of seaworthiness would be implied or inferred. This is particularly so when new elements of seaworthiness, such as container cargoworthiness, are considered which, unlike a purported general liability provision scheme, has been expressly included by Article 14(c) as one of the elements of the carrier's due diligence obligation in relation to seaworthiness.¹⁷⁹ Then, the matter of container cargoworthiness would be decided differently, depending on the jurisdiction and, as far as English law¹⁸⁰

¹⁷⁶ R. De Wit, *Multimodal Transport*, (LLP, 1995). It was stated that 'the (pure) network system of liability creates an infrastructure in which each of the liability systems governing a certain mode of transport co-exist with the others', at p.138.

¹⁷⁷ See Hellawell, R., 'Allocation of Risk between Cargo Owner and Carrier', (1979) 27 A. J. Comp. L., 357-357, at p.359.

¹⁷⁸ A vessel is considered to be seaworthy for the purpose of Article 14(a) of the Rotterdam Rules (equivalent to Article III r.1 of the Hague/Hague-Visby Rules) if her structure is adequately fit to encounter the ordinary perils of the voyage and includes her machinery and aspects of loadings and stowage. Article 14(b) of the Rotterdam Rules (equivalent to Article III r.1 of the Hague/Hague-Visby Rules) relates to the vessel's crew. Also, the vessel must be properly certificated and documented and sufficiently bunkered. Finally, Article 14 of the Rotterdam Rules requires that the vessel's holds must be cargoworthy. The element imported by Article 14(c) of the Rotterdam Rules is that '*containers supplied by the carrier in or upon which goods are carried*' must be seaworthy.

¹⁷⁹ See Aladwani, T., 'The Supply of Containers and 'seaworthiness' - The Rotterdam Rules Perspective', (2011) 42 JMLC; Margetson, N. J. 'Liability of the Carrier Under Hague (Visby) Rules for Cargo Damage caused by Unseaworthiness of Its Containers', (2008) 14 J. In. Mar. Law 153.

¹⁸⁰ See, Andrew Nicholas, 'The duties of carriers under the conventions: care and seaworthiness' cited as chapter 6 in R. Thomas (ed), *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd's List, 2010), stated that "*It is perhaps an oddity of carriage of goods by*

is concerned, the position regarding the obligation of providing a fit container is unclear.¹⁸¹

Nevertheless, the clear advantage of a uniform liability provision is that the carrier's liability vis-à-vis a cargo-claimant would be uniform for all modes of transport.¹⁸² On the other hand, however, a simple reason for not choosing the approach of a uniform liability provision is that *'the commercial needs...seem to be satisfied by the maintenance of the traditional approach, as the language of due diligence under the Hague/Hague-Visby Rules'*¹⁸³ and to disturb or discard such a clear and significant body of case law that has established a standard as regards the obligation of seaworthiness would create ambiguity and more uncertainty over an area of law where it did not exist before. Arguably, a significant number of cases, together with the associated cost, would be required to establish a well-structured interpretation of such a new provision.

A further point worth noting is that during the drafting of the Rotterdam Rules there was a majority view to retain the provision (that is now Article 14) similar to Article III, r.1 of the Hague/Hague-Visby Rules rather than using provisions similar to the Hamburg Rules.¹⁸⁴ The reason being that Article III, r.1 of the Hague/Hague-Visby Rules (similarly Article 14 of the Rotterdam Rules) *"spells out not only the carrier's obligations with regard to the carriage, but also those*

sea authorities in English law that the exact position of containers, that is, whether they are to be considered as a part of the ship or not, has never been subject to judicial scrutiny" at p.114.

¹⁸¹ See Chapter 6, also, see above, the introduction regarding the supply of containers at para. 5.1.1, at p. 330.

¹⁸² UNCTAD *Multimodal transport: The Feasibility of an international legal instrument* UNCTAD/SDTE/TLB/2003/1, 13 January 2003, p.17.

¹⁸³ Honka, H., 'The Legislative Future of Carriage of Goods by Sea: Could it not be the UNCITRAL draft?' (2004) in *Scandinavian Studies in Law*, 93, p.119.

¹⁸⁴ Article 5(1) of the Hamburg Rules provides *"The carrier is liable for loss resulting from loss of or damage to goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences."*

*with respect to the ship, which are consistent with its public law obligations regarding safety and preservation of the environment [such as SOLAS, MARPOL etc.]”.*¹⁸⁵ It is unknown why the majority held that a general duty of care provision would have a different result had it been adopted instead of a provision with a specific obligation.¹⁸⁶ This thesis does not cover the provisions of the Hamburg Rules. However, one can suggest a slightly obvious reason for not adopting a central liability provision similar to Article 5.1 of the Hamburg Rules,¹⁸⁷ because the *‘Hamburg Rules might increase uncertainty as it [would not be] clear how the provision would be interpreted’*¹⁸⁸ as there was *‘no clear guidance as to the relevant standard of care to be adopted.’*¹⁸⁹

5.10.2 A Non-mandatory Approach

The mandatory scope of application of the Rotterdam Rules is not negotiable by the parties. The Rotterdam Rules are no different from other rules; they can be seen as rigid tools, hardly possible to change or adapt to new developments of the industry. The Rotterdam Rules have a mandatory application in covering both the obligations and the liabilities of the carrier (and the maritime performing carrier party) pursuant to Article 79(1)(a) and (b). The Rotterdam Rules, in term

¹⁸⁵ See, UNCITRAL documents A/CN.9/WG.III/WP.21, 8 January 2002, Preliminary draft instrument on the carriage of goods by sea, p.25.

¹⁸⁶ E.g. Article III, r.1 of the Hague/Hague-Visby Rules and Article 14 of the Rotterdam Rules.

¹⁸⁷ The Common Understanding adopted by the United Nations Conference on the Carriage of Goods by Sea provides: *“It is the common understanding that the liability of the carrier under this Convention is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule.”*

¹⁸⁸ A/CN.9/WG.III/WP.32, p.21, para(c). See also, UNCITRAL documents A/CN.9/WG.III/WP.21, 8 January 2002, Preliminary draft instrument on the carriage of goods by sea, p.26; *“a provision [similar to Article 5.1 of the Hamburg Rules] would also preserve the benefit of much existing case law.”*

¹⁸⁹ Thomas, R., ‘An analysis of the liability regime of carriers and maritime performing parties’ cited as Chapter 3 of Thomas, R., (ed.) *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Lawtext Publishing Limited, 2009), p.59.

of freedom of contract, have a one-way nature¹⁹⁰; they allow mandatory obligations and liabilities imposed on the carrier to be increased by contract pursuant to Article 79(1), but the rules do not allow the obligations and liabilities of the shipper to be increased nor reduced, pursuant to Article 79(2).

In light of Article 79(1), one might think that there is nothing in the Rotterdam Rules that restricts the parties from agreeing on a term in the carriage contract (including inland carriage) that restricts the carrier from reducing his obligations or liabilities relating to seaworthiness from the minimum standard, e.g. cancellation of the obligation of seaworthiness to cover the period before and at the beginning of the voyage.¹⁹¹ For example, as shown in this Chapter, there is potential for conflicting regimes where the carriage involves inland carriage between the applicable international inland regime and the Rotterdam Rules, where the provisions of the international inland regime will take precedence over the Rotterdam Rules. As a result, the obligation of seaworthiness might be derogated or cancelled.¹⁹² In order to prevent the obligation of seaworthiness from being cancelled or derogated, parties can agree on a term in the contract. The author suggests the follow provision, *'If more than one international convention applies to loss, damage or delay of the cargo, provided that the unfitness of the ship or containers is the cause or the partial cause to the loss, damage or delay, the provisions regarding the carrier's obligation (Article 14) and liability (Article 17) relating to seaworthiness must govern such a claim.'*

A similar term would reduce the potential limitation or exclusion of liability when the inland transport conventions are applicable. However, there are two

¹⁹⁰ Honka, H., 'Validity of the contractual terms' cited as Chapter 17 in Ziegler, A., *The Rotterdam Rules 2008 - Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Wolters Kluwer, 2010), at p.334.

¹⁹¹ See para. 5.6.1, at p.359.

¹⁹² See para 5.6.1, at p.360.

problems as regards contractual terms. First, as stated by one commentator,¹⁹³ if the Rotterdam Rules govern the contract of carriage, any contractual agreement between the parties is likely to create problems; one of the parties might be put in an unfair situation, or, as the terms of the contract have not been tested as to their effect before a court, this may create an imbalance as regards the carrier's liability. Take for an example a contractually agreed provision to prevent derogation of the obligation of seaworthiness should an international convention prevail, which the parties have added to the contract. Where the provision has not been judicially tested, it may be that it is ultimately found (by a court) to be working against the shipper, as derogation of the seaworthiness obligation continues to be allowed when the international convention takes over.

Second, any term that works for the benefit of the shipper *only*. This may arise in a situation where the parties have unequal bargaining powers and the shipper, for example, has a stronger negotiating power than the carrier.¹⁹⁴ On the other hand, allowing freedom of contract does not reduce the room for adopting a less protective approach in countries where the carrier has the stronger negotiating power. Thus, an opposite approach restricting freedom of contract would in fact prevent the carrier from using his negotiating power to his favour in reducing his obligations and liability. This might not be possible in light of the restriction imposed on the carrier by Article 79(1). The carrier and

¹⁹³ Because either there is a contractual agreement which might put one of the parties in an unfair situation or because there is a contractual agreement, where the terms of which have not been tested as to their effect before a court (i.e. creating an unbalanced situation as to the carrier's liability). See, e.g. Honka, H., 'The Legislative Future of Carriage of Goods by Sea: Could it not be the UNCITRAL draft?' (2004) in *Scandinavian Studies in Law*, 93-120, p.93.

¹⁹⁴ Honka, H., 'Validity of the contractual terms' cited as Chapter 17 in Ziegler, A., *The Rotterdam Rules 2008 - Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Wolters Kluwer, 2010), at p.333.

maritime performing parties are precluded from excluding or limiting their seaworthiness obligation(s) and liability that may result from a breach of their seaworthiness obligation(s). For instance, any term incorporated in the contract of carriage which reduces or cancels any of the carrier's obligations and/or liabilities in relation to seaworthiness would be void and null.¹⁹⁵ It must be remembered that if the Rotterdam Rules apply as a matter of law, Article 79(1) will render void any term which purports to provide the carrier with more protection than that which is allowed under Article 17. However, if the Rotterdam Rules apply as a matter of contract or agreement, as they will when incorporated in relation to charterparties by virtue of a clause paramount, it cannot be argued that statute or Convention law will override contractual provisions and it is a matter of construction of the paramount clause or other clause which is to override.¹⁹⁶

5.11 Conclusion

The provisions of the Rotterdam Rules differ from the current regime, which does not answer the liner and commercial needs of carriage. However, it is apparent that when drafting the Rotterdam Rules, no additional efforts were made to ascertain the impact of the multimodal aspect of the Rules on the obligation of seaworthiness. This should not be overlooked, as seaworthiness is the only obligation that is unique to the sea carriage leg and, when the

¹⁹⁵ It must be remembered that Article III, r.8 of the Hague/Hague-Visby Rules provides that the carrier is not allowed to use any other clause or exception in the contract which purports to provide him with more protection than the standard of protection he is given by Article IV, r.2. Thus, clauses limiting or lessening the carrier's obligation to that which is provided by the Rules shall be 'null and void and of no effect'.

¹⁹⁶ It might be the case that the Rotterdam Rules will be incorporated by agreement in a modified form. For example, see *Tasman Discoverer* [2004] 2 Lloyd's Rep. 647 "[Liability is governed by] the Hague Rules...if the loss or damage is proved to have occurred at sea or on inland waterway; for the purpose of his sub-paragraph the limitation of liability under the Hague Rules shall be deemed to be 100 Sterling, lawful money of the United Kingdom per package or unit." Further see *Varnish v The Kheti* (1949) 82 Ll. L. Rep. 525.

obligation is required to interrelate with other inland carriage conventions, certain problems will arise, especially if the provisions of the Rotterdam Rules give way to the other conventions. Thus, one expects to see only a limited extension of the seaworthiness obligation, e.g. an obligation prior to the commencement of the voyage, or perhaps cancellation of the container cargoworthiness obligation.

It can be suggested that a clause could be added to the contract of carriage where the shipper has sufficient bargaining power (as explained above) or, as a long-term approach, a provision could be added to Article 82 and Article 26 on the first revision of the Rotterdam Rules, to the effect that the obligation of seaworthiness and the responsibility of the contracting carrier, is continuing throughout the entire transport. Consequently, the multimodal carrier will be subject to the responsibilities imposed and the liabilities entailed under Article 14 of the Rotterdam Rules. The market is in need of a single regime to govern the multimodal carriage of containers. The Rotterdam Rules were seen as a legislative step to solve the many problems produced by the past patchwork of transport law. This is not being achieved, at least not to the degree aspired to by their draftsmen. The Rotterdam Rules appear to be a step in the right direction, but they should not be used in multimodal transport without dealing first with all the potential difficulties that might arise in respect of the vessel's and containers' seaworthiness. Considerable improvement is suggested through either reform of the Rules or through the engagement of contractual provisions that may, if the shipper has sufficient bargaining power, close the gaps created by the drafting imperfections of the Rules.

CHAPTER SIX

THE SUPPLY OF CONTAINERS AND ‘SEAWORTHINESS’: THE ROTTERDAM RULES PERSPECTIVE

“And there are (other) advantages in them for you (besides); that ye may through them attain to any need (there may be) in your hearts; and on them and on ships ye are carried”
(Ghafir, Chapter 40, Verse 80)

Introduction

The carrier, under the common law, is under a strict obligation to provide a seaworthy vessel. Under the Hague/Hague-Visby Rules, however, the carrier is required to exercise due diligence to provide a seaworthy vessel before and at the beginning of the sea voyage. The obligation of due diligence, as regards supplying containers, is interpreted differently in different countries. However, unlike other jurisdictions, the question of whether the container is part of the ship or not, has not been considered by the English courts.¹

The Rotterdam Rules, in particular, Article 14(c) impose upon the carrier duties additional to those under the current law.

This Chapter intends to clarify, in the first instance, the legal position of container sea carriage under English law by particular reference to sea carriage

¹ Nicholas, A., ‘The duties of carriers under the conventions: care and seaworthiness’, cited as Chapter 6 in Thomas, R (ed.), *The Carriage of Goods by Sea under the Rotterdam Rules*, (Lloyd’s List, 2010), at p. 114; See Margetson, N., ‘Liability of the carrier under the Hague (Visby) Rules for cargo damage caused by unseaworthiness of its containers’, (2008) JIML 153, indicating that “research in English and Australian cases does not yield any cases in which an English or Australian court held that a container is part of the ship or that the container should be cargoworthy and that therefore the mandatory provisions of the H(V)R will govern the question of liability,” at p. 156.

under bills of lading and how, under the Hague/Hague-Visby Rules in the UK and in other jurisdictions, a container could possibly constitute part of the vessel. It will also demonstrate how due diligence is to be exercised by the carrier under the Hague/Hague-Visby Rules and how the position is different under the Rotterdam Rules. This Chapter is divided into two parts; Part One deals with the Hague/Hague-Visby Rules and Part Two deals with the Rotterdam Rules.

While considering this Chapter, the reader may benefit from recalling the discussion in Chapter Five (para.5.1.1) as to the liability of the party who supplied the container. As previously mentioned, containers are usually supplied by the carrier or the shipper. While the party who supplies the container will be generally liable for any damage caused by a container's defective condition, there are many instances where liability could fall to the other party, e.g. the carrier, where he fails to remedy a minor defect that was apparent upon a reasonable inspection of the container that was supplied by the shipper.

- **Practical Implications of the Carriage of Containers**

Containerised cargo is susceptible to damage by a variety of causes: improper stowage of the container; improper stowage of the cargo stowed within the container; inherent vice of the cargo inside the container; uncleanness of the container; or, from a defective condition of the container.² Thus, damage of the

² See Gard AS, *Container Carriage* (2011), pp.14-15, 20 and 22 cited online: <http://www.gard.no/ikbViewer/Content/134070/Containers%20March%202011.pdf>.

cargo inside the container does not negate the fitness of the container³ in all situations.⁴

The extent of liability (if any) for cargo damaged as a result of an unfit container that was supplied by the carrier,⁵ will be influenced by the way the court interprets the contract of carriage and bills of lading and whether it considers that the fitness of the container falls within the obligation of seaworthiness or not. This will be briefly analysed next.

Part I: Supply of Containers⁶ and “Seaworthiness” under the Current Regime

6.1 The Legal Status of Containers under the Current Law⁷

³ Prior to stuffing, a fit container should possess a valid Container Safety Approval Plate and the re-examination date should not have passed. Once this has been established, the following aspects should be checked: (1) no previous holes or tears; (2) no broken or distorted door hinges, locks, or door seal gaskets; (3) any placards or markings remaining on the outside of the empty container which refer to the previous cargo should be removed; (4) no serious structural defects such as torn or cracked corner fitting or side rails (ISO, IMO CSC/ Cir. 134 containers guidance); (5) the inside of the container should be clean, dry, without infestation, untainted, watertight and without dust. Industry Guidance for Shippers and Containers Stuffers, ‘Safe Transport of Containers by Sea’, (ICS, 2009) cited in: <http://www.ics-shipping.org/docs/default-source/resources/safety-security-and-operations/safe-transport-of-containers.pdf?sfvrsn=10>, para. 3.1.

⁴ Stevens, F., ‘Liability for Defective Containers: Charting a Course Between Seaworthiness, Care for the Cargo and Liabilities of Shippers’ cited as Chapter 2 in B. Soyer (ed.), *Carriage of Goods by Sea, Land and Air: Uni-modal and Multimodal Transport in the 21st Century*, (2013, Informa Law). Stevens stated that the standard of fitness requires only a container that is ‘weather-tight’, but not watertight, at p.26; The Court of Appeal of Aix-en-Provence, 9 December 1999, B.T.L. no 2833 of 7 February 2000, at p.93. A container was loaded with cargo and was damaged due to the stranding of the container in water for several days. The court held that the container, although it has to be fit, is not required to remain sealed when immersed in water.

⁵ Some shippers own or lease their own containers. In such a case, the container will, almost inevitably, be stuffed by the shipper. It goes without saying that the supplier of the container is the party who bears the risk and liability for cargo that is damaged by an unfit container. However, the shipper will often instruct the carrier to stuff the cargo inside the container, e.g. because the shipper does not have experience with stuffing containers.

⁶ See the definition of container in Article 1(26): ‘Container means any type of container, transportable tank or flat, swap-body, or any similar unit load used to consolidate goods and any equipment ancillary to such unit load’; see UN Doc. A/CN.9/645.

It was introduced in Chapter Five⁸ that, generally speaking, responsibility for the supply of containers and/or the stuffing of cargo inside the container will fall to one of two parties, the shipper or the carrier. Accordingly, liability for a defective container is likely to fall upon the party who has provided the container and/or the party who has stuffed the container.⁹ However, one may ask whether the supply of the container by the carrier can be treated as a separate agreement outside the scope of the Hague/Hague-Visby Rules. Answering this question will indicate whether responsibility for a defective container may shift from one party to the other.

When the obligation of exercising due diligence to make the ship seaworthy (required by Article III, r.1 of the Hague/Hague-Visby Rules) is extended to the container, the supply of containers by the carrier would not constitute a separate agreement outside the scope of the Hague/Hague-Visby Rules. Thus, liability for cargo that is damaged as a result of a defective condition of the container will be governed by the provisions of the Hague/Hague-Visby Rules and, as a result, the carrier is likely to be liable for not exercising due diligence to provide a fit container before and at the beginning of the voyage. For instance, in *The NDS Provider*,¹⁰ the Supreme Court of the Netherlands held that the obligation of exercising due diligence to make the ship seaworthy extends to containers provided by the carrier. It was also held that the clause in the bill of lading stating that “*the carrier shall be under no liability in the event of*

⁷ See the introduction to the supply of containers in para. 5.1.1, at p.330.

⁸ See para. 5.1.1, at p. 330.

⁹ Stevens, F., ‘Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers’ cited as Chapter 2 in B. Soyer and A. Tettenborn, *Carriage of Goods by Sea, Land and Air: Uni-modal and Multimodal Transport in the 21st Century*, (Informa Law, 2013), at p. 26.

¹⁰ C06/082HR, 1 February 2008. See Margetson, N., *The system of liability of Article III and IV of the Hague [Visby] Rules*, (Partis Legal Publishing, 2008), at p.48.

loss of or damage to any of the goods directly or indirectly caused by ... unsuitability or defective condition of the container” was null and void pursuant to Article III, r.8 of the Hague/Hague-Visby Rules.¹¹ The carrier was held liable for the entry of seawater into the container through rusty patches and could not rely on the clause excluding liability for damage caused by a defective container. The judgment in *The NDS Provider* was not based on the presumption that the container is part of the hold of the ship. Some authors are of the view that a container is part of the ship’s hold and, therefore, responsibility for a defective container could be placed on the shipowner, whether or not the container is supplied by him.¹² This means that the obligation of Article III, r.1 of the Hague/Hague-Visby Rules should apply to the supply of containers. The carrier, even where he was not the supplier of the defective container that damaged the cargo, will also be responsible for any damage caused by the container’s condition.

Alternatively, if the supply of containers is considered as part of the packing arrangements, the carrier will not be liable for damage caused by a defective condition of the container. The supply of containers by the carrier can be treated as a separate agreement outside the scope of the Hague/Hague-Visby Rules. For instance in the US case, *Cigna Insurance Company of Puerto Rico v The*

¹¹ The court also held that the obligation of due diligence prevented the carrier from relying on the exceptions of Article IV, r.2 of the Hague/Hague-Visby Rules. The obligation of due diligence under Article III, r.1 of the Hague/Hague-Visby Rules is seen as an overriding obligation under Dutch law. See N. Margetson, ‘Liability of the carrier under the Hague (Visby) Rules for cargo damage caused by unseaworthiness of its containers’, (2008) JIML 153, at p. 154. Regarding the overriding obligation under Dutch law, see N. Margetson, *The system of liability of Article III and IV of the Hague [Visby] Rules*, (Paris Legal Publishing, 2008), at p.73.

¹² See Stevens, F. ‘Liability for Defective Containers: Charting A Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers’ cited as Chapter 2 in B. Soyer and A. Tettenborn, *Carriage of Goods by Sea, Land and Air: Uni-modal and Multimodal Transport in the 21st Century*, (Informa Law, 2013), at p.26; Margetson, N. ‘Liability of the Carrier under the Hague-Visby Rules for cargo damage caused by unseaworthiness of its containers’, (2008) JIML 153, at p.154.

M/V Skanderborg,¹³ the carrier was not responsible where tins of olive oil, which were packed into the container by the shipper, were damaged by rust as a result of the unsuitability of the unventilated container provided by the carrier. The unsuitability of the container was treated as defective packing. COGSA imposes no duty on carriers regarding their packing arrangements with shippers, so that liability for defective packing can be excluded under the contract.¹⁴ If the container is considered as part of the packing arrangements then the carrier will not be liable for its condition, and it will not matter if the carrier supplies the container.¹⁵ However, one would in general expect to see a difference in responsibility depending on the supplier of the container. This is true as any separate contract that requires a fit container could only be relevant if the carrier supplies the container. For instance, in a case heard before the Court of Appeal of Aix-en-Provence,¹⁶ cargo had been damaged in a container that was supplied and stuffed by the carrier. The damage occurred while the container was waiting on the loading jetty. The carrier argued that at the time when the cargo was damaged, he was not liable on the basis of the 'period of responsibility' clause incorporated into the bill of lading. The court held that the supply of containers was a separate contract and the carrier did not accept responsibility over the goods by stuffing them into the containers. The claim was rejected because of the period of responsibility defence. However, even if

¹³ *Cigna Insurance Company of Puerto Rico v The M/V Skanderborg* [1996] A.M.C. 600 (U.S.D.C. Puerto Rico 1995). See the discussion of this case in Glass, D., *Freight forwarding and multimodal transport contracts*, (LLP, 2013), at para. 4.126; also in Tetley, W., 'Properly Carry, Keep and Care for Cargo - art. 3(2) of the Hague/Visby Rules', [2001] ETL 9-35, at f.n. 63.

¹⁴ Glass, D., *Freight forwarding and multimodal transport contracts*, (LLP, 2013), at para. 4.126. It is stated that: "where there is no evidence that provision of the container went beyond the sea carrier's obligation as a sea carrier it is COGSA and not state law which governs the case especially where COGSA is extended by the bill of lading to pre-loading and post-loading operations", at para. 4.126, f.n. 398.

¹⁵ See *The M/V Skanderborg* [1996] A.M.C. 600 (U.S.D.C. Puerto Rico 1995).

¹⁶ CA Aix-en-Provence, 9 December 1999, B.T. No. 2833 of February 2000, 93.

damage to containerised cargo occurs outside the period of the sea carriage, the carrier might be rendered liable if the supply of containers by the carrier is considered as a separate agreement outside the scope of the Hague/Hague-Visby Rules. It was held by the Court of Appeal of Aix-en-Provence in the *M/V Matisse* case,¹⁷ that the carrier was liable for damage that was caused by a defective container supplied by the carrier, even though the damage occurred outside the period of the maritime carriage. The court held the agreement to supply reefer containers as a rental contract accessory to the contract of carriage. A claim for damage resulting from a defective container could not be based on maritime transport law, as liability under maritime transport law had ended with the discharge of the container from the ship. Instead, the carrier was liable on the basis of the rental agreement. The court held that under the rental agreement, the carrier was obliged to supply fit containers. After the container was discharged from the ship, outside the period of the carrier's responsibility, the cargo inside the reefer container became damaged as a result of the temperature inside the container rising. This was enough proof for the court to find the reefer container defective and the carrier liable for breach of the rental agreement.¹⁸ It has been stated that "*The claim, however, was filed by the consignee, whom the court confirmed was not a party to the rental agreement between the carrier and the shipper. Undaunted, though, the court then held*

¹⁷ CA Aix-en-Provence, 15 February 2007, (2007) DMF (M/V "Matisse") cited in F. Stevens, 'Liability for Defective Containers: Charting A Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers', cited as Chapter 2 in B. Soyer (ed.), *Carriage of Goods by Sea, Land and Air: Uni-modal and Multimodal Transport in the 21st Century*, (Informa Law, 2013), at pp.28-29. See also Bordahandy, P., 'The Liability Attached to the Supply of Containers by A Maritime Carrier: A Comparative Analysis of the French Decision M/V Matisse', (2007) A&NZ MLJ 178.

¹⁸ Stevens, F., 'Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers', cited as Chapter 2 in B. Soyer (ed.), *Carriage of Goods by Sea, Land and Air: Uni-modal and Multimodal Transport in the 21st Century*, (Informa Law, 2013), at p.29.

*that the carrier's breach of its rental contract with the shipper to be a tort vis-à-vis the consignee, and granted the latter's claim against the carrier."*¹⁹ A difference in responsibility, such as a separate fitness requirement like that in the *M/V Matisse* case, could only be relevant if the carrier supplies the container.

One can argue that there is no sensible reason not to impose on the carrier an obligation of due diligence to not load an unseaworthy container on board a ship. The supply of a fit container should be imposed on the carrier regardless of whether the container is considered as part of the ship or merely considered as a package or cargo.²⁰

However, it does not matter whether the container is considered as part of the ship or cargo, should a container develop a defect or if the carrier supplies a defective container, as a defective container should also fall within Article III, r.2 and the carrier's duty to care for the cargo throughout the voyage.²¹ Even if the container is considered as part of the ship, where a defect emerges during the voyage, the carrier cannot argue that he has discharged his obligation of exercising due diligence in providing a seaworthy container before and at the beginning of the voyage and, at the same time, choose to not repair a defect that may cause damage to the cargo on the basis that he has exercised due diligence at an earlier stage. The carrier will still be rendered liable for failing to

¹⁹ Stevens, F., 'Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers' cited as Chapter 2 in B. Soyer (ed.), *Carriage of Goods by Sea, Land and Air: Uni-modal and Multimodal Transport in the 21st Century*, (Informa Law, 2013), at p.29.

²⁰ Baughen, S., *Shipping Law*, (Cavendish, 2010), at p. 136.

²¹ Stevens, F., 'Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers', cited as Chapter 2 in B. Soyer (ed), *Carriage of Goods by Sea, Land and Air: Uni-modal and Multimodal Transport in the 21st Century*, (Informa Law, 2013), at p.28-29. It is not relevant whether the container was supplied by the carrier or by the shipper.

care for the cargo.²² In a similar situation, if the Rotterdam Rules govern the contract, under the ongoing obligation imposed by the Rules, the carrier is likely to be rendered liable for not exercising due diligence to repair the defect in the container, provided that the defect is easily repairable on board. The carrier might also be liable even if the necessary spare parts are not available on board the ship but the ship has called at an intermediate port to discharge other containers.²³ With a duty of care, there can be a division of performance so that part of the responsibility can be placed on each party to the contract, e.g. the shipper or a party acting on his behalf.

A question may arise as to what would be the effect on liability of a defective container where the shipper takes responsibility for stuffing the container as with analogous 'Free In Out Stowed' (FIOS) clauses.

- **Shipper Stuffing Cargo inside the Containers**

The FIOS clause allocates responsibility for the loading, stowing and discharge of cargo to the shipper and receiver. In the US,²⁴ the Court of Appeal, with regard to the obligation in Article III, r.2 of the Hague/Hague-Visby Rules, held that the bill of lading containing a FIOS clause, which purported to relieve the carrier of liability for negligent cargo stowing and discharging, was void under s.3(8) of U.S. COGSA 1936, as s.3(2) created a non-delegable duty on the

²² Stevens, F., 'Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers', cited as Chapter 2 in B. Soyer (ed.), *Carriage of Goods by Sea, Land and Air: Uni-modal and Multimodal Transport in the 21st Century*, (Informa Law, 2013), at p.28-29. It is not relevant whether the container was supplied by the carrier or by the shipper.

²³ See the discussions at p.234 and p.323.

²⁴ *Demsey & Assc, Inc v SS Sea Star*, 461 F.2d 1009 (2d Cir. 1972) cited in A. Tettenborn, 'Freedom of contract and the Rotterdam Rules: framework for negotiation or one-size-fits-all?' cited as Chapter 4 in R. Thomas, *Carriage of Goods under the Rotterdam Rules*, (Lloyd's List, 2010), at para.4.22, f.n. 68.

carrier.²⁵ Accordingly, under American law, where cargo is stuffed inside a container that is then carried by the shipper and bad stowage results in damage to the cargo, the carrier will still be liable for that damage even if the stuffing was carried out by the shipper. Proper stowage is one of the duties under Article III, r.2 of the Hague/Hague-Visby Rules and English law is the same as American law in respect of any express exception relieving the carrier of liability for bad stowage such that the clause will be rendered null and void by Article III, r.8.²⁶ However, a distinction should be made as regards FIOS clauses when the obligation under Article III, r.2, e.g. stowage, is undertaken by the shipper rather than the carrier. In this case, the FIOS provision transfers not only the cost, but also the liability to load, discharge etc. to the cargo-interest. So, under English law, the carrier might not be liable for damage that was caused by improper stowage of cargo inside the container where it was stuffed by the shipper. In a non-container carriage case, the House of Lords in *The Jordan II* held that the FIOS clause constitutes a valid obligation clause, which is, outside the scope of Article III, r.8 of the Hague/Hague-Visby Rules.²⁷ In this case, a cargo of steel was carried under a bill of lading that incorporated the terms of a STENMOR

²⁵ See *Nichimen C In v MV Farland* [1972] 462 F 2d 319, at p.330 (2nd Cir 1972); *Dempsey & Assoc Inc v S. S. Sea Star* [1972] 461 f 2d 1009, at pp.1018-1019 (2nd Cir 1972).

²⁶ A clause such as clause 8 of the P&O Containers Bill provides: "if the container has not been packed by or on behalf of the carrier, the carrier shall not be liable for loss of or damage to the goods caused by: ... (c) the unsuitability or defective condition of the container or the incorrect setting of any refrigeration controls thereof, provided that, if the container has been supplied by or on behalf of the carrier, this unsuitability or defective condition could have been apparent upon inspection by the Merchant at or prior to the time when the container was packed." This clause attempts to define in agreed terms how the obligations specified by the Hague/Hague-Visby Rules are to be construed or performed or treated, e.g. clauses stating that a container is to be treated as a package in all circumstances, see de Wit, R., *Multimodal Transport*, (LLP, 1995), at p.416-417, where the effect of the exemption clauses on a defective container is discussed.

²⁷ Baughen, S., *Shipping Law*, (Cavendish, 2010), at p.116

ore charter. Although, no reference was made to stowage,²⁸ the court held that the carrier incurred no liability under the bill of lading in respect of bad stowage. However, if the stowage was such as to endanger the safety of the ship, the carrier would then be in breach of his obligation under Article III, r.1.²⁹

- **Carrier Stuffing Cargo inside the Container**

If the carrier supplies and stuffs the containers, difficulties may arise as to whether such operations fall within the scope of Article II of the Hague/Hague-Visby Rules.³⁰ If the process of stuffing the container, supplied by the carrier, is carried out away from the ship, the stuffing and the supply of the container might be regarded as outside the scope of control of the carrier and would be subject to the “freedom of the carrier”³¹ within Article VII.³² Then, the carrier could rely on an exclusion clause in the contract of carriage.³³ Further, in the event of damage to cargo inside the container as a result of bad stowage by the shipper, the carrier might rely on an exclusion clause to the effect that the

²⁸ Baughen, S., *Shipping Law*, (Cavendish, 2010), at p.116. ‘Clause 3 provided that the charter was FIOST term, while clause 17 provided that ‘Shipper, charterer, receiver’ were to load and trim and discharge the cargo.’

²⁹ Baughen, S., *Shipping Law*, (Cavendish, 2010), at p.96. As for the Rotterdam Rules, Tettenborn in ‘Freedom of contract and the Rotterdam Rules: a framework for negotiation or one-size-fits-all?’ cited as Chapter 4 in R. Thomas, *Carriage of Goods under the Rotterdam Rules*, (Informa Law, 2010), at para.4.22, states that English law is put beyond doubt. Article 13 explicitly allows for an arrangement whereby loading, handling, stowing or unloading is to be done by those appointed by someone other than the carrier; and elsewhere it is ensured that where this happens the carrier will not be liable. One can see that Article 17(3)(i) of the Rotterdam Rules provides an exception for loading that was done under a FIOS clause.

³⁰ Glass, D., *Freight forwarding and multimodal transport contracts*, (LLP, 2013), at para.4.124.

³¹ Glass, D., *Freight forwarding and multimodal transport contracts*, (LLP, 2013), at para.4.124.

³² Article VII of the Hague/Hague-Visby Rules provides that “*Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea.*”

³³ In *Comalco Aluminium Ltd v Mogal Freight Service Pty, Ltd (The Oceanic Trader)* (1993) 113 A.L.R. 677. The Federal Court of Australia held that the failure of the carrier-forwarder to secure the goods properly in the container was outside the period envisaged by the Hague/Hague-Visby Rules. As a result, the carrier, by virtue of Article VII, was able to rely on the exclusion clause in his consignment note. Cited in D. Glass, *Freight forwarding and multimodal transport contracts*, (LLP, 2013), at para.4.124.

stuffing was an 'act or omission of the shipper or owner of the goods, his agent or representative' pursuant to Article IV(2)(i). Alternatively, if the container was not regarded as part of the ship but as part of the packing, Article III, r.2 applies. So, where a defect in a container produces problems during the voyage, the carrier can use the defence of defective packing under Article IV, r.2(n).

The legal qualification given to a container may influence the extent of liability for damage caused by a defective container. There may be a shift of performance obligations so that some of these obligations are placed on the shipper. If the container is not regarded as part of the vessel's hold and thus no cargoworthiness obligation is imposed on the carrier pursuant to Article III, r.1(c) of the Hague/Hague-Visby Rules, such as FCL shipment,³⁴ the carrier then has a duty under Article III, r.2 to "properly and carefully load" and stow the goods. Such obligations may thus be transferred to the shipper as an extended packing responsibility.³⁵ Accordingly, one can argue that this shift may validate an exemption clause by protecting the carrier from liability for cargo loss or damage due to negligent container-stuffing by the carrier before loading.³⁶

³⁴ Full Container Load (FCL). FCL/FCL Term used to describe a container freight rate whereby the shipper is responsible for the packing of the container and the shipper or receiver, as the case may be, is responsible for the unpacking. FCL/LCL Term used to describe a freight rate whereby the shipper is responsible for the packing of the container and the carrier is responsible for the unpacking. Brodie, P., *Dictionary of Shipping Terms*, (2013, Informa).

³⁵ This redefinition of the scope of the carrier's obligation seems unaffected by Article III, r.8. See Berry, S., Eder, B., Foxton, D. and Smith, C. *Scrutton on Charterparties and Bills of Lading*, (Sweet & Maxwell, 22nd ed., 2011), para.20-051; also see Margetson, N. J. 'Liability of the Carrier under the Hague-Visby Rules for cargo damage caused by unseaworthiness of its containers', (2008) *JIML* 153-161. See, for instance, *The M/S "Zim Iberia"*, CA Paris, 19 December 1979, D.M.F. 1980, 731 at p.734; *Nile Dutch Africa Line B.V. v Delta Lloyd Schadeverzekering (The "NDS Provider")* C06/082HR, 1 February 2008.

³⁶ Thus proper stowage and securing of the goods in a container and its fitness as an article of transport have become a new facet of cargo packing, pursuant to Article III, r.2.; see Wong, J., 'Container Transportation and Anomalies in the Law', (1995), 223 *Aus. Bus. Law Rev.* 340, p.341. See the French decision of the Cour d'Appel de Rouen, 7.2.1985, [1987] DMF 510. The court held that the exclusion of liability for the supply of a defective container was not null and

One might ask whether the shipper is obliged to inspect a container that was supplied by the carrier.

Liability for an unfit container, in the context of the Hague/Hague-Visby Rules, may not be excused for not inspecting and not refusing to carry a defective container that it is not fit for sea carriage where this is 'apparent upon inspection' before loading. There are two reasons in support of this.

If the container is considered as part of the ship and thus the exercise of due diligence is extended to cover the container, it might be true to say that as inspecting the ship is part of the obligation to exercise due diligence, then the inspection of containers is not delegable.³⁷ In practice, a container can be stuffed and prepared from an inland point by the shipper or by the carrier's forwarding agent. The carrier will not be relieved of the obligation to inspect the ship and container even though he has asked those parties to check the condition of the container. Should the carrier prove that the container's defect was visible to the shipper by routine inspection at the time of packing, he will still not be relieved as regards his seaworthiness obligation although he may seek an indemnity from the shipper on a contractual or tortious basis. In addition, the shipowner/carrier might not be able to discharge his due diligence

void by reason of Article III, r.8. Cf. *Federated Department Stores v Brinke* 450 F. 2d 1223 (5th Cir. 1971).

³⁷ *The Muncaster Castle* [1961] 1 Lloyd's Rep. 57; *The Nicholas H* [1994] 1 Lloyd's Rep. 492, p.498-499 (CA), where it was the shipowner but not the ship classification society who owed a duty of care to the cargo owners; J. Lowices, 'Independent contractor' [1960] CLJ 17, p.20; Villareal, 'The Concept of Due Diligence in Maritime Law' [1971] 2 JMLC 763, p.769.

obligation by showing that he employed competent experts to perform and supervise the task of making the container cargoworthy.³⁸

The second is that where loss or damage arises from a failure to exercise due diligence to make the container cargoworthy at some point prior to loading the container, the carrier may be liable on the basis of actual knowledge of defects or failure to use due diligence in inspecting the container prior to stuffing, even if the inspection took place well in advance of loading.³⁹ This is true at least as far as the periodic examination of containers is concerned.⁴⁰ Containers are regularly subjected to “*thorough examinations organised by the owner in connection with major repairs, refurbishments or on/off-hire interchanges.*”⁴¹ Such inspections may not reveal the status of the container as defective at any stage of carriage or handling prior to being loaded onto the ship.

Stevens has concluded that if the container is regarded as part of the ship and thus the seaworthiness obligation is extended to containers provided by the carrier, clauses such as Clause 11 of the MSC Bill of Lading,⁴² would not shift

³⁸ Stevens, F. ‘Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers’, cited as Chapter 2 in B. Soyer (ed.), *Carriage of Goods by Sea, Land and Air: Uni-modal and Multimodal Transport in the 21st Century*, (Informa Law, 2013), at p.37.

³⁹ *Huo International v Daisy Shipping (The Yamatogawa)* [1990] 2 Lloyd’s Rep. 39, where the investigation went back to the vessel’s previous Special Survey.

⁴⁰ Contracting States to the International Convention on Safe Containers (CSC) must set out ‘periodical examination schemes’ and ‘Approved Continuous Examination Programmes’. See Booker, M., *Containers Conditions, Law and Practice of Carriage and Use*, (Derek Beattie Publishing, 1987, Vol.1), see Chapter 1, at p.2.

⁴¹ See, Container Carriage, a selection of articles previously published by Gard AS (March, 2011) Gard News 151, ‘Inspection and certification of cargo containers’, (September/November 1998), at pp.16-17.

⁴² MSC Bill of Lading, cl.11. Merchant-Packed Containers

“If a Container has not been packed by or on behalf of the Carrier

11.1 The Merchant shall inspect the Container for suitability for carriage of the Goods before packing it. The Merchant’s use of the Container shall be prima facie evidence of its being sound and suitable for use.

11.2 The Carrier shall not be liable for loss of or damage to the Goods caused by:

(a) the manner in which the Goods have been packed, stowed stuffed or secured in the Container, or

the responsibility of inspecting and ensuring the suitability of the container to the shipper, as the seaworthiness obligation is an overriding operation that cannot be delegated or contracted out of. Thus any clauses that intend to shift the responsibility for, or risk of, a defective container would be invalid.⁴³

Qualification in the bill of lading concerning the container's defect by way of a printed clause⁴⁴ may not suffice to position the risk on those referred to in the relevant clause (e.g. the shipper) where a defect is obvious to the carrier, until a

(b) the unsuitability of the Goods for carriage in the Container supplied or for carriage by the Container between the ports or places specified herein, or

(c) the unsuitability or defective condition of the Container or the incorrect setting of any refrigeration controls thereof, provided that, if the Container has been supplied by or on behalf of the Carrier, this unsuitability or defective condition would have been apparent upon inspection by the Merchant at or prior to the time when the Container was packed, or

(d) packing refrigerated Goods that are not properly pre-cooled to the correct temperature for carriage before the refrigerated container has been properly pre-cooled to the correct carrying temperature.

11.3 The Merchant is responsible for the packing and sealing of all Merchant-packed Containers and, if a Merchant-packed Container is delivered by the Carrier with an original seal as affixed by the Merchant or customs or security control intact, or the Carrier can establish bona fide circumstances in which the original seal was replaced, the Carrier shall not be liable for any shortage of Goods ascertained upon delivery.

11.4 The Merchant shall indemnify the Carrier against any loss, damage, liability or expense whatsoever and howsoever arising caused by one or more of the matters referred to in clause 11.2, including but not limited to damage to Container, other cargo and the Vessel."

⁴³ Stevens, F., 'Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers' cited as Chapter 2 in B. Soyer and A. Tettenborn, *Carriage of Goods by Sea, Land and Air: Uni-modal and Multimodal Transport in the 21st Century*, (Informa Law, 2013), at pp. 40-41.

⁴⁴ See Maersk Line Multimodal Transport Bill of Lading clause 11

11. Shipper-packed containers

"If a Container has not been packed by the Carrier:

11.1 This bill of lading shall be a receipt only for such a Container;

11.2 The Carrier shall not be liable for loss of or damage to the contents and the Merchant shall indemnify the Carrier against any injury, loss, damage, liability or expense whatsoever incurred by the Carrier if such loss of or damage to the contents and/or such injury, loss, damage, liability or expense has been caused by all matters beyond his control including, inter alia, without prejudice to the generality of this exclusion:

(a) the manner in which the Container has been packed; or

(b) the unsuitability of the Goods for carriage in Containers; or

(c) the incorrect setting of any thermostatic, ventilation, or other special controls thereof; or

(d) the unsuitability or defective condition of the Container provided that, if the Container has been supplied by the Carrier, this unsuitability or defective condition could have been apparent upon reasonable inspection by the Merchant at or prior to the time the Container was packed.

11.3 The Merchant is responsible for the packing and sealing of all shipper-packed Containers and, if a shipper-packed Container is delivered by the Carrier with any original seal intact, the Carrier shall not be liable for any shortage of Goods ascertained at delivery.

11.4 The Shipper shall inspect Containers before packing them and the use of Containers shall be prima facie evidence of their being sound and suitable for use."

clear and specific qualification incorporated into the bill of lading is made.⁴⁵ If the carrier supplies the container and the defect was obvious to him on loading, the carrier most probably cannot shift the risk of the defective container onto the shipper. The carrier in this scenario should not allow the container to be loaded on board the ship; he should seek a replacement.

Furthermore, provisions, such as Clause 15(2) of the Mitsui OSK Lines Combined Transport Bill 1993,⁴⁶ deal with the failure of refrigerated containers and the vessel's cargo equipment. The language of the provision seems to impose an obligation on the carrier, before and at the beginning of the voyage, to exercise due diligence similar to the duty under Article III, r.1 of the Hague/Hague-Visby Rules. However, the duty under this Clause seems to limit the exercise of due diligence to the refrigerated plant and the apparatus of the container that relates to the refrigerated system. This type of Clause may relieve the carrier from a failure of the refrigeration system provided that the carrier exercised due diligence at the beginning of the voyage, although it probably does not intend to shift the responsibility of due diligence to inspect the container to the shipper, nor is the carrier relieved from damage that was caused by any other defective condition of the container, e.g. holes in the container.

⁴⁵ Compare Glass, D., *Freight Forwarding and Multimodal Transport Contracts*, (LLP, 2nd ed., 2012), para. 4.129, where reference is made to the duty of the carrier when packing is obviously damaged under the CMR Convention; Clarke, M., *International Carriage of Goods by Road: CMR* (LLP, 2009), at para.84. Containers are not considered under the CMR as special equipment or a trailer, it is *sui generis*, para.75f(i). (Cases are concerned with the shipper's packing)

⁴⁶ 15. Specialized Carriage:

“(2) *The Carrier shall not be liable for any loss or damage to the Goods arising from latent defects, derangement, breakdown, defrosting, stoppage of the refrigerating, ventilating or any other specialized machinery, plant, insulation and/or any apparatus of the Container, vessel, conveyance and any other facilities, provided that the Carrier shall before and at the beginning of the Carriage exercise due diligence to maintain the Container supplied by the Carrier in an efficient state.*”

Even if, under Clause 15(2) of the Mitsui OSK Lines Combined Transport Bill 1993, the obligation of due diligence to provide a seaworthy container is imposed on the supplying carrier, the level of inspection required to determine whether a container is in apparent good order and condition may not be possibly ascertainable. The level of due diligence in checking the fitness of the container is discussed below.

6.2 The Standard of Due Diligence in Checking the Fitness of the Container

In practice, there are a number of checks that carriers should carry out in order to ascertain the proper stowage of goods inside the container. In addition, prior to loading the cargo inside the container (stuffing), the supplier of the container, must also ascertain the fitness of the containers supplied in accordance with the International Convention for Safe Containers 1972 (CSC 1972), which sets out test procedures and strength requirements that should be carried out by an authorised officer.⁴⁷ These are explained below.

6.2.1 Thoroughness of the Inspection

The containers should be cargoworthy, i.e. in sound, safe and weatherproof condition, properly certificated (usually by a Classification Society) and physically fit to withstand the expected sea carriage conditions. For example,

⁴⁷ Entered into force on 6 September 1977. Amendments to the Convention came into force after the ninety-first session of the Maritime Safety Committee in November 2012. Although, this Convention does not deal with the matter of the container's cargoworthiness, it provides a unified international safety regulation and compliance or non-compliance with that regulation would affect the cargoworthiness of the container and/or the vessel. See IMO, International Convention for Safe Containers, 1972, (2012, IMO Publishing), at p.5.

checking that they are fitted with adequate door gaskets, sealed doors, proper ventilation or cooling mechanisms and that they comply with CSC,⁴⁸ TIR, ISO⁴⁹ and AQIS requirements⁵⁰ according to the relevant shipping standards. The container should be checked to ensure that it is weatherproof and that its exterior does not show significant damage that would result in the container being deemed unsuitable by way of allowing entry of water, insects or contaminants that could potentially damage the cargo. This can be done by thoroughly looking at the exterior of the container's walls; they should be in good condition and not significantly distorted. The doors, including hinges, latches, seals and gasket, should work properly and be capable of being securely locked and sealed.⁵¹ The fitness of a container does not merely relate to its ability to withstand the rigours of transit and handling, but also to the strength of its securing points with other containers where any weakness may not damage the cargo but may render the vessel unstable and unseaworthy by causing stacks of containers to collapse.⁵² If the container is of the refrigerated type, it is important that the refrigeration system is checked by considering

⁴⁸ International Convention on Containers (CSC, 1972) primarily deals with the safety of containers rather than the particular cargoworthiness of containers. CSC was drafted following an IMO session promoting safety of containerisation in maritime transport. The purpose is to maintain a high level of safety in the carriage and handling of containers by imposing strength requirements, test procedures, etc.

⁴⁹ Refer to current standard ISO 6346, Freight containers - coding, identifying and marking.

⁵⁰ See Shipping Australia Ltd *Standards for food quality shipping containers* (Pink Booklet, 1998), p.9.

⁵¹ Examination of containers, commonly, includes: (1) exterior examination: inspecting the interior surface of the container and setting a mark on the part where damage, distortion, leaking or any other damage lies, if any; (2) interior examination: inspecting the interior surface of the container and finding out whether it is watertight, light-leaking, or contaminated; (3) examination of the doors: inspecting whether the doors are watertight, the locks are intact; (4) examination of cleanness: clearing the inside of the container from the remainder, rust, wet, odour or other contamination left from the preceeding cargo. See Zhigang Yang, *The Practice and Regulations of Container Intermodal Transport*, International Shipping Dept., Shanghai Maritime University. <http://www.carecprogram.org/uploads/events/2011/CFCFA-Logistics-Training-Mongolia/Practice-and-Regulations-of-Container-Intermodal-Transport.pdf>

⁵² A sound container should withstand stacking weight of less than 192,000 kg. See, IMO, International Convention for Safe Containers, 1972 (CSC), (2012, IMO Publishing), pp.54 and 56.

indications of temperature on the outside of the refrigeration container. An examination can involve, at the least, a detailed visual inspection of the exterior of the container to detect defects which would render the container unfit. This would include ensuring that any damaged parts or components have been adequately and safely repaired or replaced.⁵³ A container's lifting lugs or eye bolts require particular attention to ensure that parts are not rusty and can handle the weight of the container during loading/unloading, as well as when the container is secured to other containers. Cargo containers or specialised containers, i.e. tank containers, should be inspected and maintained according to industry guidelines and recommendations.⁵⁴

The above raises the question of what type of skills the carrier's inspector should possess, as well as for how long such an inspection should take place. It is not entirely true to say that the carrier is 'an unskilled person'.⁵⁵ He is, in fact, expected⁵⁶ to possess some knowledge as regards the suitability and durability of packing in general and the container's fitness in particular.⁵⁷ However, in practice, the carrier has no time to have the containers inspected by his crew,⁵⁸ as the containers' movement and stowage onto the vessel can take a few

⁵³ Maheshwar, C., *Container Refrigeration*, (2008, Whitherby Publication), para.12.1-12.7.

⁵⁴ See Booker, M., *Containers Conditions, Law and Practice of Carriage and Use*, (Derek Beattie Publishing, 1987, Vol.1).

⁵⁵ *CN Vascongada v Churchill & Sim* [1906] 1 K.B. 237, p.245, per Channel J.

⁵⁶ Unless that is a custom and practice between the shipper and the carrier implied in the contract. See Tetley, W., *Marine Cargo Claims*, (Blais, 4th ed., 2008), p.2169-2170. According to the International Convention on Safe Containers (CSC) only a 'competent person' may carry out the examination. This is someone who has sufficient knowledge and experience of containers to enable him to perform his duties satisfactorily so as to be capable of determining whether the container is cargoworthy or not.

⁵⁷ *Silver v Ocean Steamship Co.* [1930] 1 K.B. 416, p.440, per Slessor LJ: "*the capacity of the goods safely to travel was part of their order and condition.*" However, the carrier is not expected to have the highest expertise; such knowledge that is possessed by the shipper who provides the cargo. See *Westcoast Food Brokers Ltd v The Hoyanger (The Hoyanger)* [1979] 2 Lloyd's Rep. 79, at p.89 (Canadian Federal Court). The Court held that: "... no legal justification for fixing liability on a carrier based on the lack of knowledge or expertise of an expert which the carrier was not by law nor by duty to the consignee about to engage."

⁵⁸ Gaskell, N. et al., *Bills of Lading: Law and Contracts*, (London: Informa, 2000), p.216, para.7.30.

seconds. This is particularly the case in modern container terminals. Thus, in practice, the carrier must rely on his agents at the receiving depot to note any defects on arrival and have them recorded in a received for shipment bill.⁵⁹

In *The TNT Express*,⁶⁰ the carrier handed a container to the shipper so that the latter could use it to stuff cargo. A 'Container Interchange Receipt'⁶¹ was provided which required the shipper to clearly mark all damages or defects found using a sketch of the container. No specific notifications were put down yet the shipper recorded 'good condition-dirty' on the bill of lading. The carrier delivered the cargo damaged by water and the question was whether the clause⁶² relieved the carrier of liability on the basis that the defective condition of the container would have been apparent upon reasonable inspection by the shipper. In fact, after delivery, the survey revealed that there were recent rust patches on the inner walls of the container and a small gap behind the door gasket, which was only apparent when the doors were fully dogged (firmly closed). It was agreed that, under the clause, the carrier would carry the burden

⁵⁹ As part of his duty to provide a seaworthy vessel, the carrier may refuse loading any container that endangers the safety of the vessel. It might not be obvious whether a defect of the container would potentially endanger the safety of the vessel or merely damage the cargo inside it. The carrier may not want to take the risk of loading a defective container and can therefore refuse to allow the container to be loaded. The safety of the vessel is the carrier's responsibility as operations, including loading etc., if transferred to a third party such as the shipper, still require the master to supervise such operations and to intervene when stowage can affect the seaworthiness of his vessel. See *Court Line v Canadian Transport* (1940) 67 Ll. L. Rep. 161, p.166; see also Lord Wright at p.168, and Lord Porter at p.172. *Transocean Liners Reederei G.m.b.H. v Euxine Shipping Co Ltd (The Imvros)* [1999] 1 Lloyd's Rep. 848, p.851.

⁶⁰ *Marbig Rexel Py Ltd v A.B.C. Container Line N.V. (The TNT Express)* [1992] 2 Lloyd's Rep. 636 (Sup. Ct. N.S.W.).

⁶¹ In combined transport operations, a number of different intermodal carriers will be used and, between themselves, they will issue receipts which are called 'equipment interchange receipts' or 'container interchange receipts'. The contents vary but there is a diagram of the container and at each stage the goods passed on, e.g. from road carrier to container depot, the receiver will be asked to mark on the interchange receipt any damage or defect of the container.

⁶² A port to port bill was issued in respect of the container and the bill provided *inter alia*:
"10(i) If a container has not been filled, stowed, packed, stuffed or loaded by ... the carrier the carrier shall not be liable for ... damage to the goods caused by ... (c) the ... defective condition of the container provided that where the container has been provided by ... the carrier ... paragraph (c) shall only apply if the ... defective condition arose without any want of due diligence on the part of the carrier or would have been apparent upon reasonable inspection by the merchant at or prior to the time when the container was filled."

of proof in demonstrating that the defective condition of the container would have been apparent upon reasonable inspection by the shipper when it was consolidated. However, the defects to the door gaskets would not have been obvious. The carrier was not able to succeed in his claim under the clause because the phrase 'defective condition of the container' must refer to the particular carriage under consideration.

There can be defects such as 'microholes' that are not visible upon normal inspection and require an expert's survey to discover them. Thus, they should not render the carrier liable if he is not able to reveal the defect by a normal and careful inspection of the container.⁶³ It is also submitted that if the shipper is given a container by the carrier to stuff, the carrier is not required to inspect the container in detail for a defect, e.g. a manufacturing defect or weakness due to the steel structure of the container that is only discoverable by detailed technical analysis.⁶⁴

Inevitably, one can ask, on some occasions, is it necessary for the carrier to inspect the inside of the container?

The carrier is normally not obliged to inspect the container from the inside if the container is sealed by the shipper.⁶⁵ Thus, the inspection is obviously limited to

⁶³ See De Wit, R., *Multimodal Transport*, (LLP, 1995), at p.418.

⁶⁴ Stevens, F. 'Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers' cited as Chapter 2 in B. Soyer and A. Tettenborn, *Carriage of Goods by Sea, Land and Air: Uni-modal and Multimodal Transport in the 21st Century*, (Informa Law, 2013), at p. 38. R. De Wit has stated that "*whether or not the consignor is under a duty to inspect the containers (including inspection for 'microholes'), this cannot be used as an exception against a third party holder of a negotiable document, who relies on the carrier for the performance of certain essential duties such as the use of fit container,*" *Multimodal Transport*, (LLP, 1995), at pp.418-419.

⁶⁵ *Insurance Company of North America v Dart Container Line* 629 F.Supp. 781, 1987 A.M.C. (42) 44 (E.D.Va. 1985) where the court stated (in footnote 3): "*While opening a sealed container to inspect its content may not be convenient for the carrier, it does not have the right and opportunity to do so...*"

its outside appearance.⁶⁶ However, the position differs if for a strong reason an inspection is required. For instance, if the container's exterior indicates that there is something wrong inside, such as a gas leak or suspicious dangerous cargo,⁶⁷ as the latter may affect the seaworthiness of the vessel. This approach is nowadays believed to be possible if the situation raises some doubts for an internal inspection that is related to security matters, i.e. requirements of the ISPS Code.⁶⁸ For instance, in one reported incident, lemons from Venezuela to the USA were stored in five refrigerated containers. The American Coastguard received some information that the cargo inside was not lemons. Goods may be 'dangerous' within this principle for, if owing to legal obstacles regarding their carriage or discharge, they may involve detention of the vessel.⁶⁹ The vessel prior to entry to the port of discharge had the container investigated by the Coastguard.⁷⁰ The carrier may therefore be required to avoid not only the uncargoworthiness of cargo that endangers the vessel⁷¹ but also to avoid the expense of delays and other costs incurred as a result of denial of the vessel's

⁶⁶ De Wit, R., *Multimodal Transport*, (LLP, 1995), para.9.24.

⁶⁷ Clarke, M., *International Carriage of Goods by Road: CMR*, (Informa, 2013). It was suggested that at common law, as regards carriage by sea, "*there may be a duty to inspect the contents of a container, if there is (a) a trade custom to do so, e.g. in the case of certain hazardous goods, (b) a special agreement to do so, or (c) if the carrier is put on inquiry by circumstances (such as a visibly damaged container or leaking contents) suggesting that the goods have been or will be damaged*", para. 25a(i).

⁶⁸ On a national level, the United States, following the events of September 2001, introduced a set of measures to minimise the risk of terrorist attacks, including the Container Security Initiative (CSI). See Michel, K., *War, Terror and Carriage by Sea*, (LLP, 2004), p.745.

⁶⁹ *Mitchell v Steel* [1916] 2 K.B. 610; *Effort Shipping Co Ltd v Linden Management SA (The Giannis N.K.)* [1993] 2 Lloyd's Rep. 171; [1998] 1 Lloyd's Rep. 337 (HL). Ground extraction meal pellets loaded on the ship were infested with insects. As a result, the vessel was refused entry to a number of countries and was ordered to dump its cargo of wheat at sea. It was held that the pellets were dangerous cargo.

⁷⁰ The incident was reported in TT Talk Edition 57, 23.11.04. <http://www.ttclub.com/fileadmin/uploads/ttclub/PublicationsResources/TT%20Talk%2057.pdf> (last visited 29.9.2014).

⁷¹ Suspicious containers may not successfully be loaded on a US-bound vessel, and ships with suspicious containers of cargo are kept out of US waters. For such reasons, the obligation of providing a cargoworthy container may require the carrier to screen or check (by opening) the container if there are any doubts about its contents. See Block, S., 'The Container Security Initiative: Pushing out the Front Lines in the War on Terrorism', cited in http://www.forwarderlaw.com/library/view.php?article_id=686&highlight=container.

entry⁷² or of an inspection of the container before loading it on board the vessel.⁷³

6.3 Imposing the Container 'Seaworthiness' Obligation under English Law

One can say that the purpose of the two major obligations imposed on carriers (under Article III, rr.1 and 2 of the Hague/Hague-Visby Rules)⁷⁴ is to protect the cargo carried on board against the perils of the sea in the contemplated voyage. Thus it would be illogical to exclude the obligation to exercise due diligence from the carrier for the reason that it is not expressly mentioned in Article III, r.1 of the Hague/Hague-Visby Rules,⁷⁵ considering that the seaworthiness of a container ship clearly depends on, *inter alia*, the condition, weight and contents of each container.⁷⁶ Moreover, in some cases, the cargo-claimant can do better than establishing a *prima facie* case. Sometimes, it may be easier for the claimant to prove that the carrier was in breach of his seaworthiness obligation and that this breach caused the loss or damage to the goods.⁷⁷ This will create

⁷² Especially if any doubts are raised by the carrier as regards the content of the container. The Court of Appeal, in *Daewoo America v Round the World Corporation* (1998) 32 F. Supp. 2d 705 (US 2th Circuit CA), confirmed the dismissal of the claim on the grounds that "*a bill of lading is not prima facie evidence of the contents of a sealed container because the contents are not discoverable from an external examination*", at pp.708-709.

⁷³ The charterer will be liable for the cost of discharging and reloading the cargo if properly and reasonably incurred. See, e.g. *Micada Cia Naviera v Texim* [1968] 2 Lloyd's Rep. 59.

⁷⁴ The author is of the opinion that both obligations should be imposed upon the carrier. For example, a carrier who fails to supply a sound refrigerated container should be liable for not exercising due diligence to provide a seaworthy vessel. On the other hand, where the carrier has failed to maintain adequate ventilation or to maintain the required temperature, this can be equated to a failure to fulfil the obligation under Article III, r.2. See in Chapter Two, sub-para. 'The importance to make the distinction', the advantageous difference for the claimant when his claim is based on the failure to provide a seaworthy vessel, at p. 152

⁷⁵ Note that the obligation under Article III, r.2 can be excluded by Article IV, r.2.

⁷⁶ See Aladwani, T., 'The Supply of Containers and "Seaworthiness - The Rotterdam Rules Perspective', (2011) JMLC, 185-209, pp.188-189. The structure of the containers would directly affect the structural safety of the vessel.

⁷⁷ The shipper may, in some situations, find it easy to prove the unseaworthiness of the container rather than proving failure to care for cargo, especially when he (the shipper) packed the container and noticed the defective condition and notified the carrier of it. In this case, the

another approach for the claimant to seek compensation for his damaged cargo.⁷⁸

In order to include the obligation of exercising due diligence to provide a seaworthy vessel for the carriage of containers, the containers must be included into the facets of seaworthiness.⁷⁹ However, due to the reason that containers have emerged following the drafting of the Hague Rules, it can be found that neither the carrier's obligation in Article III, r.1, nor the *Travaux Préparatoires*, provide a clear answer as to whether a container is part of the vessel or her equipment.⁸⁰ To impose the obligation of seaworthiness on the carrier, the court must be persuaded that a container should be regarded as part of the vessel or her equipment. One might presume that there is an argument that the container is analogous to some equipment.⁸¹ In some circumstances, it will be quite clear that there is unseaworthiness. For example, failing to exercise due diligence to prevent unsafe cargo from being loaded will make the ship unseaworthy.

As mentioned above, it is unclear under English law whether there is an obligation on the carrier who supplies the container to exercise due diligence in supplying a cargoworthy container. However, it could be argued that a container

shipper may seek to claim full compensation for the damage caused by the defective condition of the container, which could be prevented if the carrier relies on an exclusion list or clause when the claim is based on failure to care for cargo. This might be useful in countries where the exercise of due diligence is part of the overriding principle (i.e. where the carrier is not allowed to rely on an excluded peril if he did not exercise due diligence). The shipper might then claim the full amount of compensation and prevent the carrier from relying on the excluded peril or exclusion clause.

⁷⁸ In some common law systems, the carrier's liability for a defected container would emanate either from the general warranty of fitness in bailment or from the statutory provisions on cargoworthiness: see Shachar, Y., 'The Container Bill of Lading as a Receipt', 10 (1978) JMLC 39-78, p.76.

⁷⁹ See Chapter Two for the elements of seaworthiness: vessel seaworthiness, cargo-hold cargoworthiness, equipment seaworthiness, bunker seaworthiness, crew seaworthiness, etc.

⁸⁰ Cf. Margetson, N. J., 'Liability of the carrier under the Hague (Visby) Rules for cargo damage caused by unseaworthiness of its containers', (2008) JIML 159.

⁸¹ In some circumstances it will be quite clear that there is unseaworthiness. For example, loading anything that is unsafe along with a failure to exercise due diligence to prevent it being loaded will make the ship unseaworthy.

might, in a practical way, be part of the vessel. One can argue that the container is (a) part of the vessel superstructure, or (b) part of the vessel's equipment. This is discussed below.

6.3.1 (a) The Container as Part of the Vessel's Superstructure and Seaworthiness

It is a known fact that containers loaded onto certain container vessels contribute to the overall strength of the vessel's superstructure as well as the stability of the vessel.⁸² Thus, without having containers on board, the stability of such vessels will be lessened to the extent that the vessel cannot trade on the High Seas.⁸³ Furthermore, containers are used not merely to accommodate cargo but to secure other containers when stacking them vertically.⁸⁴ It could be presumed, therefore, that container vessels cannot perform the duty of loading, stowing, securing and lashing on board without the use of containers. In other words, the container does not merely serve the cargo that is carried within it, but also the vessel,⁸⁵ as it is part of the superstructure that provides the vessel with buoyancy. At least, to some extent, it would seem likely that liability will arise if a

⁸² See Gard A., *Container Carriage*, (2011), pp.14-15, 20 and 22 cited online: <http://www.gard.no/ikbViewer/Content/134070/Containers%20March%202011.pdf>.

⁸³ This is a custom-built vessel for the carriage of containers. Containers are loaded one on top of the other and guided into position by the means of vertical guides at each corner of the container. The guides are part of the vessel for the purpose of joining the containers to the vessel's structure. See Bugden, P. and Lamont-Black, S., *Goods in Transit*, (Sweet & Maxwell, 2nd ed., 2010), p.375; see Branch, A., *Elements of shipping*, (Routledge, 2007), pp.45 and 352.

⁸⁴ See Aladwani, T., 'The Supply of Containers and 'Seaworthiness' - The Rotterdam Rules Perspective', (2011) 42 JMLC, 185, p.188.

⁸⁵ Stevens, F., 'Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers', p.6, presented at the Eighth Annual International Colloquium on Carriage of Goods - Sea Transport and Beyond, 6-7 September 2012, Swansea University. It was stated that: "even if containers are not a part of the ship from a technical point of view, they have to be assimilated to a part of the ship from a legal point of view." Citing the approach of the Dutch Supreme Court (Hoge Raad), 1 February 2002, case C06/082HR (*The NDS Provider*).

defective container prevents the proper stowage of other containers and consequently imperils the safety of the vessel. This might be the equivalent of a vessel that has a faulty design that leads to damage of the cargo carried on board.⁸⁶

In some cases, construction or design fault in any part of the vessel could be adequate to render her unseaworthy if it affects her ability to encounter the ordinary perils of the sea.⁸⁷ For example, in *USA v Charbonnier*,⁸⁸ a defective vent design of vent pipes caused a build-up of pressure and was held to render the vessel unseaworthy.

The structural state of the containers, which are being vertically stacked on top of each other, may affect the ambit of exercising due diligence to make the vessel seaworthy. For example, the collapse of a stack of containers may endanger the safety of the vessel⁸⁹ and the structural (defective) state of one or several containers, e.g. weak structure, may also damage the cargo inside it/them.⁹⁰ This can happen if the statutes and rules of classification societies

⁸⁶ See *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1987] 1 Lloyd's Rep. 32. (Marine Insurance case).

⁸⁷ See, e.g., *The Miss Jay* [1987] 1 Lloyd's Rep. 32 (CA), where a design malfunction occurred by using material which was not suitable for the purpose and was held to render the vessel unseaworthy.

⁸⁸ *USA v Charbonnier* [1930] AMC 187.

⁸⁹ See the *S. S. Red Jacket* [1978] 1 Lloyd's Rep. 300 (American case). Uncargoworthy container caused a whole stack of containers to collapse and be washed overboard. Bordahandy, P-J., 'Containers: a conundrum or a concept?' (2005) 11 JIML, 342-371, p.369. See also Booker, M., *Containers: Conditions, Law and Practice of Carriage and Use*, (Derek Beattie Publishing, 1987), p.111; Bugden, P., 'The Supply of Containers and Seaworthiness' (2002) accessed at www.forwarderlaw.com/feature/conworth.htm; Bugden, P. and Lamont-Black, S., *Goods in Transit*, (Sweet & Maxwell, 2nd ed., 2010), p.375. For the opposite view that containers should not be considered as part of the vessel, see Margetson, N. J., 'Liability of the carrier under the Hague (Visby) Rules for cargo damage caused by unseaworthiness of its containers', (2008) JIML, 153-161.

⁹⁰ There is a difference between a container damaging the cargo inside it because of a defect and damaging the cargo in other containers. The first is cargoworthiness, the second comes under unseaworthiness since that is a matter of general safety of the ship and cargo. In our example, the weak structure of container(s) is said to affect the first, the cargo inside the defective container; that is cargoworthiness. Second, it affects the general safety of the ship, that is, unseaworthiness.

related to the container's construction, design and lashings are not observed. As a result, the container might be defective. The purpose of using containers is paralleled to the purpose of the tank on an oil tanker or a cargo hold similar to the hold of a bulk carrier. On the basis that they are clearly a receptacle for the carriage of cargo, containers play a great role in the transportation of cargo. Without them, the execution of the contract of carriage by a container vessel would be impossible and their defects would likely cause damage to the cargo or potentially endanger the safety of the vessel or her crew.⁹¹

Furthermore, it follows that some courts⁹² have treated a carrier-supplied container as part of the structure of a cellular containership which cannot carry break bulk cargo and has extended the duty to make the vessel seaworthy to such containers. In *The NDS Provider*,⁹³ the Supreme Court of the Netherlands held that if the container was supplied or owned by the carrier, it should be cargoworthy and therefore the obligation to exercise due diligence under Article III, r.1 of the Hague/Hague-Visby Rules applies to the container as well.⁹⁴ This view imposes a duty on the carrier to ensure that the containers are not only suitable to carry the cargo inside it, but also to provide a container which is safe

⁹¹ In relation to latent defects in containers see Article IV r.2(p) of the Hague Visby Rules. The exception is most likely to relate to cargo-handling gear and equipment which are not considered to be part of the vessel such as shore or floating cranes and containers. See Treitel and Reynolds, F., *Carver on Bills of Lading*, (Sweet and Maxwell, 3rd ed., 2011), para.9-228.

⁹² *Shanghai Maritime Court in Zhejiang Branch of Chinese People's Insurance Co v Guangzhou Ocean Shipping Corp & Shanghai Branch of China National Foreign Trade Transportation Corp* [1994] Sup. Ct. LR, Issue 1 for case notes and comments on this decision. See Guo Yu, 'Responsibility for unsuitable container in China', [1995] LMCLQ 15. See also District Court of Rotterdam in *NDAL v Premium Tobacco*, SCN 1 February 2009, C06/082 HR, *The NDS Provider*. For case notes on this decision, see Margetson, N., 'The Liability of the carrier under the Hague (Visby) Rules for cargo damage caused by unseaworthiness of its containers', (2008) Available at: [http://www.pomorci.com/Skole/Pomorsko%20pravo/Liability%20of%20the%20carrier%20under%20the%20Hague%20\(Visby\)%20rules.pdf](http://www.pomorci.com/Skole/Pomorsko%20pravo/Liability%20of%20the%20carrier%20under%20the%20Hague%20(Visby)%20rules.pdf); *American Supreme Court in Gutierrez v Waterman S.S. Corp* 373 US 20682, S. Ct. 1185, 1963 AMC 1649, 10 L. Ed. 2d 297; (USSC 1963).

⁹³ *Nile Dutch Africa Line B.V. v Delta Lloyd Schadeverzekering (The "NDS Provider")* C06/082HR, 1 February 2008.

⁹⁴ *Nile Dutch Africa Line B.V. v Delta Lloyd Schadeverzekering (The "NDS Provider")* C06/082HR, 1 February 2008.

to be carried and does not endanger the safety of the vessel or its crew, as well as the suitability of the container to carry dangerous cargo.⁹⁵

Another example is the case of *Houlden & Co v S. S. Red Jacket*,⁹⁶ where the carrier was responsible for an incident where a defective container loaded with ingots collapsed during a storm causing the loss of 50 containers. The court held⁹⁷ that the carrier had failed to exercise due diligence to make the vessel seaworthy. In addition, the carrier had failed to provide a fit container because the collapsed container was old and, prior to loading, a visible inspection indicated some defects of the container. The carrier cannot himself add, in the bill of lading, a clause⁹⁸ that concerns the liability of specialised carriage, such as a dangerous cargo container or a refrigerated container, to exclude liability for latent defects of a container, if he has not exercised due diligence before and at the beginning of the carriage to provide a suitable seaworthy container.⁹⁹

⁹⁵ In brief, it requires containers to be designed and structured by a competent authority, similar to a classification society. For further information see Luddeke, C., *Marine Claims - A guide for the handling and prevention of marine claims*, (1996, 2nd ed., LLP), p.158. Containers themselves should be structured in compliance with the Container Safety Convention (CSC).

⁹⁶ *Houlden & Co v S. S. Red Jacket* [1977] AMC 1382 (SDNY, 1977), [1978] 1 Lloyd's Rep. 300. There is an older case, decided by the 2nd Circuit in 1968, where the Court held: "*The seaworthiness doctrine is in essence that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used. As a ship that leaks is unseaworthy; so is a cargo container that leaks. Although cargo containers are normally furnished by shippers, a container is equated with the ship*", *Nobel v Lehigh Valley Railroad Co.*, 388 F. 2d 532 (USDC SDNY 1977) cited in F. Stevens, 'Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers' cited as Chapter 2 in B. Soyer and A. Tettenborn, *Carriage of Goods by Sea, Land and Air: Uni-modal and Multimodal Transport in the 21st Century*, (Informa Law, 2013), at p.30, f.n. 22.

⁹⁷ Although the shipper had caused the tinned fish to be stowed in a negligent manner, this was not the proximate cause of the loss and damage. "*The Court, therefore, cannot find that improper stowage of the ingots in the container CMLU 122590 was a proximate cause of the loss and damage to the plaintiffs*" at pp.308 and 311. As per Motley, D. J. in *Nile Dutch Africa Line B.V. v Delta Lloyd Schadeverzekering (The "NDS Provider")* C06/082HR, 1 February 2008.

⁹⁸ P & O Containers Bill of Lading 1989, Clause 17 (2), "*The Carrier shall not be liable for any loss of or damage to the Goods arising from any defect of any specialised Container, provided that the Carrier shall, before and at the beginning of the Carriage, exercise due diligence to maintain the Container in an efficient state.*"

⁹⁹ For more information, see Glass, D., *Freight Forwarding and Multimodal Transport Contracts*. (Informa, 2nd ed., 2012), para.4.98.

Finally, in the early days of the emergence of containers, it was argued that any container used for the carriage of goods by sea should be considered a part of the carrying vessel.¹⁰⁰ This idea came about even before the purpose-built containerships, when containers were carried together with traditional general cargo. At that time, containers were no means of stability nor did they contribute toward the strengthening of the vessel's superstructure. Under the circumstances of carrying containers on board a purpose-built containership, one can indeed see that the containers provide safety to the cargo and the vessel. Consequently, the containers should be regarded as part of the vessel.¹⁰¹

Depending, however, on the container's type,¹⁰² some containers are more likely to be regarded as equipment of the vessel. This would be the case for an integral reefer container that is connected to a power source or to the vessel's cooling plants.

¹⁰⁰ Bugden, P., 'The supply of containers and seaworthiness', (2002) cited in www.forwarderlaw.com/feature/conworth.htm, "If, as is probably the case, the container does fall within the definition of a ship, hold, refrigerating or cool chambers within Article III, it may mean that the carrier has a liability for its condition even if it was not originally supplied by him", f.n. 17; see also Stevens, F., 'Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers' cited as Chapter 2 in B. Soyer and A. Tettenborn, *Carriage of Goods by Sea, Land and Air: Uni-modal and Multimodal Transport in the 21st Century*, (Informa Law, 2013), at p.29 citing *Noble v Lehigh Valley Railroad Co* 388 F.2d 532 (USCA 2nd Cir. 1968), "Although cargo containers are normally furnished by shippers, a container is equated with the ship."

¹⁰¹ See Bannister, J. E., and members of the Insurance Institute of London, *Containerisation and Marine Insurance*, (The Institute of London, 1972), p.26. It was stated that "new containerships ... led to longer opening of deck ... result to much greater exposure to the hazards of the sea. The potential reduction in hull strength has been met by hatch cover and sound containers.". see also Bannister, J. E., 'Containerisation and Marine Insurance', JMLC (1974) pp.463-482. It was stated that "container ship has much greater exposure to the hazards of the sea. The need for access to container cells along most of the length of the ship has led to longer hatches. The potential reduction in hull strength has been met by heavier scantlings. Hatch cover are much stronger to carry the container deck load" at p.465.

¹⁰² Such as dry freight containers, insulated containers, refrigerated containers, bulk containers, ventilated containers, flat rack containers and platform flats, open top containers, tank containers, SeaCell containers, etc. For the purpose and use of each containers, see Branch, A., *Elements of Shipping*, (Routledge, 2007), pp.361-372.

6.3.2 (b) Container as Equipment

Even if the container that is supplied by the carrier is not taken to be part of the vessel's superstructure, it might fall within the carrier's obligation to exercise due diligence to provide a seaworthy vessel in Article III, r.1(b), i.e. to 'properly man, equip and supply the ship.' Therefore, it can be assumed that the fitness of the equipment that is used for, or to assist, the carriage of the cargo, i.e. vessel's derrick, cranes, 'tween decks or subdivision bulkheads¹⁰³ is included in the exercise of due diligence. This would lead to the conclusion that the carrier has a duty to exercise due diligence in respect of containers when providing a seaworthy vessel, and the failure to 'properly equip' the vessel with suitable containers could amount to a breach of the duty to exercise due diligence,¹⁰⁴ even if the equipment is not rigidly connected to the vessel's structure and does not form part of the vessel.¹⁰⁵ For example, dunnages, shifting-boards or spare parts are often used on board a vessel and their presence in correct order and condition is important,¹⁰⁶ as they may affect the seaworthiness of the vessel. Due to the design of the vessel, this equipment can be dismantled for maintenance or to provide more space for cargo to be loaded.¹⁰⁷ Dunnage

¹⁰³ See *Parsons Corp v CV Scheepvaartonderneming Happy Ranger (The Happy Ranger)* [2006] 1 Lloyd's Rep. 649. The vessel, despite the fact that it was new, was held to be unseaworthy because of faulty derrick cranes that caused damage to the cargo.

¹⁰⁴ *The Kamsar Voyager* [2002] 2 Lloyd's Rep. 57. Failure to supply the proper piston for a main engine rendered the vessel unseaworthy.

¹⁰⁵ It is not necessary to keep equipment, such as ship's sails, masts, dunnages, etc., on-board the vessel at all times. The technicality of similar equipment was explained in *Claude Bouillon et Cie v Lupton* (1863) 143 E.R. 726.

¹⁰⁶ See *Ismail v Polish Ocean Lines (The Ciechocinek)* [1975] Lloyd's Law Rep. 170; *Upper Egypt Produce Exporters and Others v Sanatamana* (1923) 14 Ll. L. Rep. 159. Damage to the cargo was caused by the growth of bacterial organisms and this was due to a lack of sufficient ventilation for not supplying a proper dunnaging. The court held that there was bad stowage, namely, the lack of any insufficient bottom dunnage rendered the vessel unseaworthy.

¹⁰⁷ *Ismail v Polish Ocean Lines (The Ciechocinek)* [1976] Q.B. 893. The plaintiff chartered the defendants' ship to carry potatoes from Egypt to England. The ship's master considered that although the cargo capacity was 1,400 tonnes, only 1,000 tonnes of potatoes should be carried and should be ventilated by dunnage. The charterparty requested that the stowage and

material, for instance, does not form part of the vessel, and is not usually kept on board the vessel unless a specific cargo has to be loaded and international regulations require the shipowner to use them for safe stowage. However, if the carrier supplied defective dunnage and as a result caused damage to the cargo, it would render the vessel unseaworthy on the basis of defective equipment.¹⁰⁸ A similar example can be found in *The Standale*,¹⁰⁹ where the owner was held liable and the vessel was found unseaworthy. In this case, the vessel was not adequately fitted for the carriage of cargo because dunnage or shifting-boards were not used.¹¹⁰

dunnage instructions of the charterer were to be carefully followed and be executed under the supervision of the master who was to remain responsible for proper stowage and dunnage. The charterer's agent in Egypt, notwithstanding the master's advice, insisted that the ship carry 1,400 tonnes of potatoes and expressly stated that the potatoes were so packed as to make dunnage unnecessary. The charterer had, by his agent, accepted responsibility for the stowage and had thereby relieved the master of the responsibility under the charterparty.

¹⁰⁸ Compare, Aladwani, T., 'The supply of container and 'seaworthiness' - The Rotterdam Rules perspective', (2011) 42 JMLC 185, pp.191-192, with Stevens, F., 'Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers', p.6, presented at the Eighth Annual International Colloquium on Carriage of Goods - Sea Transport and Beyond, 6-7 September 2012, Swansea University. It goes without saying that it is logical that the dunnages are not considered as part of the vessel. Stevens' analogy is not logical. Vessel's equipment is never to be regarded as part of the vessel, but it is equipment of the vessel that requires the exercise of due diligence.

¹⁰⁹ *The Standale* (1938) 61 Ll. L. Rep. 223, p.230. Out of three thousand two hundred tonnes of grain, a portion was stowed in five thousand bags without separation. Consequently, the cargo shifted, the vessel developed a list and became unmanageable. As a result, the vessel sank.

¹¹⁰ Stevens, F., 'Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers' cited as Chapter 2 in B. Soyer and A. Tettenborn, *Carriage of Goods by Sea, Land and Air: Uni-modal and Multimodal Transport in the 21st Century*, (Informa Law, 2013), at p.30, f.n 23, citing Belgium: Comm. C. Antwerp, 8 March 1999, Transportrechtspak BVZ no 295a. See also Comm. C. Antwerp, 10 January 1973, R.H.A. 1973, 60 (*MS Mormacrigel*). The court seems to consider the container as a piece of equipment that the carrier issues, but rejects the claim against the carrier on the ground that the due diligence had been exercised. Stevens, at p.34, argues in favour of the application of Article III, r.2 to the supply of defective containers. Note that the care of cargo under Article III, r.2 is limited only from the time of loading to the time of discharge. Thus, this limitation would miss an essential part of preparing the container prior to its loading into the ship. It can be suggested that container cargoworthiness (Article III, r.1) is an essential obligation to be imposed on the (supplier) carrier along with the care of cargo under Article III, r.2. See also Stevens, F., 'Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers', p.1, presented at the Eighth Annual International Colloquium on Carriage of Goods - Sea Transport and Beyond, 6-7 September 2012, Swansea University; see also Aladwani, T. 'The Supply of Containers and 'Seaworthiness' - The Rotterdam Rules Perspective', (2011) 42 JMLC 185, pp.188-190.

Part II: Supply of Containers and ‘Seaworthiness’ under the Rotterdam Rules

Turning to the Rotterdam Rules, important points need to be addressed. Providing a seaworthy container is now one facet of the seaworthiness obligation and the obligation is ongoing until the vessel arrives at the discharge port. Arguments have been advanced regarding the interpretation and/or application of Articles 14(c) and 17(5)(a) of the Rules. However, it is unknown how courts will determine liability for an unfit container. This part of the Chapter deals with this issue and will introduce Article 14(c).

6.4 The Potential Liability of the Supplying Carrier for Cargo Damage Caused by a Faulty Container

The position insofar as the supply of containers is concerned under English law is unclear. Namely, whether a container is part of the vessel or not,¹¹¹ or whether the carrier will be liable for damage caused by not exercising due diligence to supply a seaworthy container.¹¹² In determining the question of liability under the Rotterdam Rules, the starting point for the courts must be to interpret the Rotterdam Rules on their own basis without reference to the previous approach. However, it might not be possible for the courts to come to a clear view on the proper interpretation of the Rotterdam Rules and the courts may find it necessary to refer to previous international case law. It is assumed that the court will refer to previous case law on the interpretation of the

¹¹¹ See f.n. 1 of this Chapter, at p. 386.

¹¹² The opposite to the due care obligation under Article III, r.2.

Hague/Hague-Visby Rules when interpreting the Rotterdam Rules in the absence of clear wording. Thus, a special reference to case law of the previous regime might be made when interpreting the new regime e.g. the Rotterdam Rules.¹¹³ One can assume that courts will adopt one of two potential approaches. The first, and arguably the most likely, is the usual approach of drawing analogies from past case law on vessels' seaworthiness and subsequent application of those principles to questions on container cargoworthiness. The second approach is one where liability for the defective containers would be regarded differently depending on how the containers are considered vis-à-vis their status as part of the vessel along with decisions under the previous law, e.g. the Hague/Hague-Visby Rules, in each particular jurisdiction. One can assume that an English court would resort to consulting decisions of courts in other jurisdictions where the issue of container cargoworthiness has already been considered and decided under their national system. This will be discussed next.

6.4.1 Interpreting Article 14(c) of the Rotterdam Rules by Special Reference to Earlier Case Law - The English Court

When deciding on liability for a defective container, especially in relation to untested Rules, the court's starting point, as mentioned above, will be to interpret provisions of the Rotterdam Rules which are related to the obligation and liability for a defective container. For instance, the court will look at Article

¹¹³ It was discussed in Chapter One that, in the absence of clear wording, special reference to case law of the Harter Act was made when interpreting the Hague/Hague-Visby Rules. Further, it was stated that the overriding nature of the due diligence obligation to make the vessel seaworthy derived from the development of pre-convention case law in this area in the UK. See para.1.6.1.1, at p. 71.

14(c),¹¹⁴ which provides that “*The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:*

(c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.”

The obligation of exercising due diligence to provide and maintain a seaworthy container extends only to those containers that are supplied by or on behalf of the carrier. If the container¹¹⁵ is supplied by somebody else other than the carrier, then the container will be regarded as ‘goods’¹¹⁶ rather than a container. This means that the obligation relating to the seaworthiness/cargoworthiness of the container is not imposed on the carrier, as he is not the supplier of the container.¹¹⁷

It was mentioned in Chapter Two¹¹⁸ that the language used in Article 14 of the Rotterdam Rules is the same familiar language used in Article III, r.1 of the Hague/Hague-Visby Rules. Article III, r.1(c)¹¹⁹ covers facets of seaworthiness related to the ship, crew, cargo holds, equipment and bunkers but it does not cover the carriage of containers. The text of Article 14(c) of the Rotterdam

¹¹⁴ It is likely that the court in their research would also interpret other provisions, which relate to liability for a defective container. For instance, the courts are likely to refer to Articles 17(5)(a)(iii) and 80(4) of the Rotterdam Rules.

¹¹⁵ Article 1(26) provides that “container” means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

¹¹⁶ Article 1(24) provides that “Goods” means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment a container not supplied by or on behalf of the carrier.

¹¹⁷ Thus, the discussion in this Part assumes that the container was supplied by the carrier.

¹¹⁸ See para. 2.11, at p.123.

¹¹⁹ Article III, r.1(c) of the Hague/Hague-Visby Rules provides that: “*The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to: (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.*”

Rules covers equally, in addition to seaworthiness, the containers in which the goods are carried.¹²⁰

Following a proposal by delegates from the Netherlands, the words ‘including containers’ in the previous draft of the Rotterdam Rules were replaced by ‘and any containers’ in Article 14(c) in order to avoid the container being regarded as an intrinsic part of the ship.¹²¹ Some courts have reached that result under the Hague/Hague-Visby Rules by regarding the container as a part of the ship.¹²² The *Travaux Préparatoires* are an important tool to assist in the interpretation of the Rules. However, a thorough study of the *Travaux Préparatoires* does not reveal whether an unfit container, e.g. a holed container, would be rendered uncargoworthy for merely damaging the cargo stuffed inside it even though the safety of the ship was not endangered by the defective condition of the container.

6.4.1.1 Unseaworthiness without Endangering the Safety of the Vessel

A possible approach that may be adopted by the English courts in respect of the seaworthiness obligation under Article 14 and its application to containers is to render the defective container that has caused damage to cargo stuffed inside it uncargoworthy or unseaworthy under Article 17(5), even if the defective condition does not endanger the safety of the ship. This approach may be adopted without considering the container as part of the cargo hold (in which

¹²⁰ Delebeque, P., ‘Obligations of the Carrier’, cited as Chapter 4 in von Ziegler, A. et al (eds.), *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Wolters Kluwer, 2010), at p.89; Sturley, M. et al. (eds.), *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters Limited, 2010), at para.5.020.

¹²¹ UNCITRAL Doc. A/CN.9/658/Add.9, at para.10.

¹²² Sturley, M. et al. (eds.), *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters Limited, 2010), at f.n. 60, para. 5.020.

case the unfitness of the container would render the vessel unseaworthy). This is analogous to earlier case law where the unfitness of the cargo holds rendered the vessel herself unseaworthy.¹²³ In *The Dimitrios N. Rallias*,¹²⁴ the cargo was damaged by water ingress through a fracture on an air pipe gooseneck on deck leading to the cargo hold. The court held that the vessel was unseaworthy and that the carrier was liable for his failure to test the pipe prior to the commencement of the voyage. If an English court adopted the same approach to a container, where the container's unfitness, e.g. a blown gasket or a crack, caused damage or loss to the cargo stowed inside it, the container would be deemed uncargoworthy or unseaworthy and as a result, the carrier, if he also failed to discharge the due diligence obligation, would be held liable for damage caused by such unseaworthiness of the container.

6.4.1.2 No Unseaworthiness or Risk to the Vessel's Safety

At the other end of the spectrum is the potential that the English courts will not hold the vessel to be uncargoworthy or unseaworthy if the container's unfitness causes damage only to the cargo but does not endanger the safety of the vessel.¹²⁵ In other words, the obligation to provide a seaworthy vessel is only breached if there is something endangering the safety of the vessel. Although this approach appears to go against case law relevant to cargoworthiness only,

¹²³ The structure or condition of the hold can make a ship unseaworthy. See para. 1.4.5, at p.63.

¹²⁴ *The Dimitrios N. Rallias* (1922) 13 Ll. L. Rep 363; see also *Sewaram v Ellerman Lines Ltd* (1930) 37 Ll. L. Rep. 97, where a vessel was rendered unseaworthy for a fractured pipe and the carrier failed to defend the case on the grounds of a latent defect; see also the American case *The Otho* [1944] A.M.C 43, where a crack on the plating rendered the vessel unseaworthy).

¹²⁵ *The Arianna* [1987] 2 Lloyd's Rep. 376, per Webster J, p.389. It has been said that there is "an inevitable presumption of fact" that a vessel is unseaworthy only if there is something about it which endangers the safety of the vessel or its cargo"; *Elder, Dempster & Co v Paterson, Zochonis & Co* [1924] A.C. 522, p.562.

there is potential for the carrier to escape liability if the container is seen as a means of stowing and/or securing cargo. For instance, if the twist-locks connecting and securing a container stack failed, causing the container stack to collapse or fall over and crash onto other containers in such a way as to damage the cargo without however endangering the safety of the vessel, the carrier will not be held liable for uncargoworthiness of the container.¹²⁶ The court in such a case might be justified to draw analogies from stowage¹²⁷ cases rather than from cases relating to the unfitness of the cargo holds. Such was the ruling in *Elder, Dempster & Co v Paterson Zochonis & Co*,¹²⁸ where a general cargo vessel was held by the House of Lords to be seaworthy notwithstanding the lack or non-use of 'tween decks that were necessary to prevent the lower cargo from crushing,¹²⁹ even though the cargo was found to be damaged on arrival.¹³⁰

Another example is where a reefer container is supplied by the carrier, thus rendering the carrier bound, pursuant to Article 14(c), to ensure that the reefer

¹²⁶ The difference would be relevant if the liability of the carrier depended on the distinction, e.g. if he could exclude liability for bad stowage that cause cargo damage but not unseaworthiness as at common law.

¹²⁷ Stowage as referred to in this Part must be distinguished from the stowage (stuffing) of the goods within the container itself. This Part is considering the stowage of the container on-board the vessel.

¹²⁸ *Elder, Dempster & Co v Paterson, Zochonis & Co* [1924] A.C. 522, p.561. Lord Sumner stated: "*Bad stowage, which endangers the safety of the ship, may amount to unseaworthiness, of course, but bad stowage, which affects nothing but the cargo damaged by it, is bad stowage and nothing more, and still leaves the ship seaworthy for the adventure, even though the adventure be the carrying of that cargo*"; see also *The Arianna* [1987] 2 Lloyd's Rep. 376, per Webster J. There is one approach where the vessel can be rendered unseaworthy when "*the cargo [inside a container] might cause significant damage to its cargo or which renders it legally or practically impossible for the vessel to go to sea or to load or unload its cargo...*", p.389.

¹²⁹ One could draw an analogy between a situation where there were no tween decks at all and a situation where tween decks were used but were unfit, causing damage to the cargo without endangering the safety of the vessel.

¹³⁰ The distinction was necessary in that case because of a stowage exception, which is why the court needed to make the point.

unit of the container is in good working order and capable of maintaining the required temperatures throughout the period of carriage.¹³¹

It is arguable that liability for a container should not be tested against the safety of the vessel. Otherwise the position, as outlined above, would be contrary to English law and, arguably, against the underlying policy of the drafters of the Rotterdam Rules, as the policy is not confined to safety aspects alone. One may suggest that in order to avoid this, it is preferable to follow an approach similar to that adopted by most courts in other jurisdictions, where the container is supplied by the carrier and is held to be part of the vessel's hold.¹³²

However, this suggestion may cause another problem. The approach that considers the container as part of the vessel or her equipment¹³³ would create a rather strange result if the contract of carriage was made on the basis of a volume contract.¹³⁴ This is because, pursuant to Article 80(1), a volume contract provides that the carrier is allowed to derogate from his obligations and liabilities imposed under the Rotterdam Rules, e.g. the obligation of exercising due

¹³¹ See Springall, R., 'The transport of goods in refrigerated containers: an Australian perspective' [1987] LMLCQ, 216, p.220. In order to reject liability for a latent defect (Article IV, r.2(p) of the Hague/Hague-Visby Rules opposed to Article 17(3)(g)) of the Rotterdam Rules, the sea carrier would have to explain how the defect of the reefer container which caused the damage occurred, and demonstrate how much defect was latent and not discoverable when exercising due diligence. In other words, the defect would be required to be of a type which could not be discoverable by a person of competent skill using ordinary care.

¹³² Suggested in the Report of UNCITRAL Working Group III on the work of its twelfth session (document A/CN.9/544, para.152).

¹³³ It was shown in the introduction chapter that the English courts are often reluctant to consider the case law of other jurisdictions when applying international regimes. The Rotterdam Rules may not be an exception. See f.n. 88, at p.72.

¹³⁴ Baatz, Y. et al., *The Rotterdam Rules - A Practical Annotation*, (2009, Informa). It was stated that pursuant to Article 1(2) of the Rotterdam Rules, "*There are three elements which make a contract of carriage into a volume contract: (a) specification of the quantity or range of cargo to be carried; (b) more than one shipment throughout; (c) a specified period of time.*", para. 80.1, at p.247.

diligence. However, pursuant to Article 80(4), the carrier is only allowed to derogate from his duty in providing a cargoworthy vessel or container but not in making the ship and her crew seaworthy. Thus, the approach that considers the container as part of the vessel or her equipment would be at odds with Article 80(4) of the Rotterdam Rules.

Further, Article 79(1) regards any clause limiting or opting out of any of the carrier's obligations, i.e. seaworthiness, null and void.¹³⁵ Thus, insofar as containers may be considered as a mobile hold of the ship, the clause that exempts the cargoworthiness of the container can be considered null and void. The result would be surprising, as Article 79 would clash with the intentions behind Article 80; it would destroy the purpose of the volume contract to ensure free negotiating powers between the parties.¹³⁶

Thus, the correct interpretation of the Rotterdam Rules is that¹³⁷ the container should not be considered as part of the vessel or her equipment but to make the liability of the carrier subject to the applicable contract of maritime carriage and/or to the contract for the supply of containers agreed between the

¹³⁵ Article 79(1) reads that: *"Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it: (a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention; (b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or (c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in Article 18."*

¹³⁶ The same effect is applicable under the Hague/Hague-Visby Rules. See Wijffels R., 'Legal aspects of carriage in containers', (1967) *Transportrecht*, 331-349, p.339. This means that even if there is an applicable exclusion of container cargoworthiness, the exclusion would be unlawful if the damage occurs within the ambit of the Hague/Hague-Visby Rules. If the damage occurs outside the ambit of the Hague/Hague-Visby Rules, i.e. before or after the sea carriage, the exclusion may still be valid. See Bugden P., 'What if a container is unsuitable for the intended cargo?' Available at: http://www.forwarderlaw.com/library/view.php?article_id=138&highlight=container.

¹³⁷ This point is not limited to volume contracts. It reinforces the argument that the correct interpretation of the Rotterdam Rules is that a container should not be regarded as part of the ship. See para. 6.4.1 the interpretation made on Article 14(c).

parties.¹³⁸ This would offer the advantage of giving a clear solution and a clear legal framework to the operation of containers in respect of, for example, issues such as the extension of the carrier's liability (if the parties to the contract agreed) in order to cover door-to-door transportation in a volume contract rather than liability for sea carriage only. Furthermore, one cannot argue that the container should be regarded as a cargo hold on the basis that the legal obligation of the carrier relating to the cargoworthiness of the container supplied by him is placed on the same footing as a cargo hold (Article 14(c)). Such context does not by any means provide similarities in relation to the cargo hold's practical use, i.e., being temporary, but it merely imposes, on the carrier, an obligation to exercise due diligence equal in a legal aspect to the cargo holds.

6.4.2 The Supplying Carrier's Responsibility for Damage to Containerised Cargo Caused by Defective or Unsuitable Containers; Judgments from Other Jurisdictions on Container Unseaworthiness

The requirement relating to container seaworthiness is new and there is no guidance from previous case law for courts and lawyers on this point. It follows that there is no knowledge as to what is to be reasonably expected from the carrier.¹³⁹ It will take time for the courts to test this new statutory requirement.¹⁴⁰

¹³⁸ It can be argued that this is the approach of the common law countries. Bordahandy stated that: "[a]t common law countries, in cases of difficulty it is the contractual provision, namely the clauses of the bill of lading, that will have primacy and which will be subject to a scrupulous analysis by the court in order to resolve a dispute between parties." French cases cited in Bordahandy, P-J., 'The liability attached to the supply of containers by a maritime carrier', (2007) 21 A&NZ Mar LJ, 178-182, p.180.

¹³⁹ For cases concerning unseaworthy containers, the English courts might, to a certain extent, look at cases decided by foreign courts; see e.g. *Zim Israel Navigation Ltd v The Israeli Phoenix Assurance Company Ltd (The Zim Marseilles)*, [1999] ETL 535, pp.547-548 (Supr. C. of Israel). The district court held that the standard of examination was not sufficient for the shipowner to discharge his obligation. Each individual container had not been inspected, even though it was known that the container in question suffered from manufacturing defects and had undergone

Additionally, even if the English courts sought to follow the route of applying cases decided in other jurisdictions, which would allow for the harmonised interpretation of international conventions, it would not be a straightforward exercise. The question of whether the carrier should be liable under the Rotterdam Rules for cargo damage caused by the unsuitability of his container may have been answered differently under various legal systems.¹⁴¹ Some jurisdictions have applied to the supply of suitable containers the same due diligence test under the Hague/Hague-Visby Rules, Article III, r.1(a) or (c), to the equipment of the vessel, a part of the vessel and/or her cargo hold. In other words, the obligation of due diligence is applied differently in different countries. Contrasting examples are given below.

6.4.2.1 The American Approach to Unfit Containers: Endangering the Safety of the Vessel

Although not often, in some early cases, the principle of container cargoworthiness was raised in the American Supreme Court.¹⁴² Subsequently,

repairs and that the container, just prior to its loading, was subjected to strengthening repairs. The court found that such repairs and the standard of inspection of defects was not adequate. It should be noted that Israel's law (like US, French and Dutch law) imposes on the carrier under the obligation of exercising due diligence to provide a seaworthy vessel, i.e. the Hague/Hague-Visby Rules obligation to provide a cargoworthy container.

¹⁴⁰ This is usually the case with every unknown or new piece of legislation (e.g. the changes from common law duty to merely a duty to exercise due diligence). Each new provision needs to be tested by the courts and they will need time to familiarise themselves with new concepts or principles and delineate a convention's boundaries and applicability.

¹⁴¹ Bordahandy, P-J., 'The liability attached to the supply of containers by a maritime carrier: a comparative analysis of the French decision M/V Matisse Cour d'Appel D'Aix-en Provence 2eme Chambre-15 Fevrier 2007', (2007) 21 A&NZ Mar LJ, 178, p.181. The assumption is that although the discussion here is of an older case law, the situation may arise if the Rotterdam Rules are adopted by several countries; some may apply the provisions on liability for defective containers differently depending on the way the defective container has been considered under the previous regime of a given jurisdiction. This, however, is not a justifiable approach as the Rotterdam Rules represent a new direction. Therefore, it would not be necessary or appropriate to refer to pre-existing case law, as this will defeat the potential harmonisation of the provisions on liability under the Rotterdam Rules.

¹⁴² *Gutierrez v Waterman S.S. Corp* 373 US 20683, S. Ct. 1185, 1963 AMC 1649, 10 L. Ed. 2d 297; (USSC 1963). "The high court then reiterated that seaworthiness was not limited to fitness for travel, but extended to fitness for loading and unloading. Furthermore, the high court ruled

the court in *The S. S. Red Jacket*¹⁴³ held that the sea carrier supplier of a defective container was liable for the entire cargo damage attributed to the uncargoworthy container.¹⁴⁴ The unfitness of the container in *The S. S. Red Jacket* had endangered the vessel's safety.¹⁴⁵ If the uncargoworthiness of the container had not endangered the safety of the vessel, the carrier would not have been held liable for the damage caused by the container given that the container would not be considered as part of the vessel's equipment.¹⁴⁶ In this case, the unfit condition of the container resulted in the failure of the container stacks, which consequently endangered the safety of the vessel and was not merely damaging to the cargo. As far as the author is aware, there is no American case that renders the carrier liable for an unfit container where the container did not endanger the safety of the vessel.

6.4.2.2 The Chinese Approach to Unfit Containers: The Vessel's Safety is Irrelevant

In contrast to the American approach, a Chinese court in *Chinese People's Insurance Co. v Guangzhou Ocean*¹⁴⁷ held that the container was unseaworthy

that when shipowners accept cargo in faulty containers or allow containers to become faulty, they owe a duty to those who are injured." The case and note are cited in Bordahandy P-J, 'Containers: a conundrum or a concept?' (2005) II JIML 342, p.369 and f.n. 156.

¹⁴³ *Houlden & Co v S. S. Red Jacket and American Export Lines Ltd and Others (The S. S. Red Jacket)* [1978] 1 Lloyd's Rep. 300 (US Southern Dist. Ct. N.Y.).

¹⁴⁴ It was held that: "*The defendants had not exercised due diligence to make the vessel seaworthy as required by the United States COGSA, for they should not have permitted the container, which was part of her equipment, to be loaded on board.*" *Houlden & Co v S. S. Red Jacket and American Export Lines Ltd and Others (The S. S. Red Jacket)* 1977 AMC 1382 (USDC SDNY 1977), [1978] 1 Lloyd's Rep. 300.

¹⁴⁵ *Houlden & Co v S. S. Red Jacket and American Export Lines Ltd and Others (The S. S. Red Jacket)* [1978] 1 Lloyd's Rep. 300 (US Southern Dist. Ct. N.Y.). A defective container was supplied to the shipper who packed it prior to it being loaded onto the vessel. During the voyage, it broke loose during heavy weather and, as a consequence, a total of 43 containers were swept overboard.

¹⁴⁶ *Houlden & Co v S. S. Red Jacket and American Export Lines Ltd and Others (The S. S. Red Jacket)* [1978] 1 Lloyd's Rep. 300 (US Southern Dist. Ct. N.Y.), p.311.

¹⁴⁷ *Zhejiang Branch of Chinese People's Insurance Co v Guangzhou Ocean Shipping Corp & Shanghai Branch of China National Foreign Trade Transportation Corp* [1994] Sup. Ct. L.R. Issue 1. See the English translation of the full case at www.lawinfochina.com.

without the stipulation that the unfitness of the container should endanger the safety of the vessel. In other words, it is immaterial for Chinese courts whether or not the unfitness of the container endangered the safety of the vessel. The container in this case was regarded as part of the vessel despite the fact that the Maritime Code of the People's Republic of China says nothing about containers provided by the carrier.¹⁴⁸

In this case, three containers of black tea, which were supplied by the carrier and stuffed by the forwarder, were carried to Hamburg from Shanghai. One of the containers was not properly cleaned before stuffing the cargo and, as a result, the cargo inside the container was damaged due to the residual smell from previously carried cargo. The insurer raised a claim against the carrier and the forwarder. In the first instance, both the carrier and the forwarder were liable for providing an uncargoworthy container.¹⁴⁹ On appeal, both defendants' appeals were dismissed. The carrier and the forwarder were held liable for 60 per cent and 40 per cent of the total loss respectively.

There are some points in the case which indicate that such an approach may show inconsistencies with English law and would thus be difficult for an English court to follow. First, the Chinese export regulations¹⁵⁰ impose duties beyond those of statutory inspection, namely to inspect the container as part of the due diligence obligation and thus to inspect the containers and cargo before stuffing

¹⁴⁸ Article 42 of the Maritime Code of the People's Republic of China regards containers supplied by the cargo-interests as 'Goods'.

¹⁴⁹ Article 47 of the Chinese Maritime Code provides that: "*the carrier shall, before and at the beginning of the voyage, exercise due diligence to make the ship seaworthy, properly man, equip and supply the ship and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.*" This provision is presumably based on Article III, r.1 of the Hague/Hague-Visby Rules.

¹⁵⁰ The State Administration for the Inspection of Import and Export Commodities (SAIEC).

takes place.¹⁵¹ Both the carrier and forwarder had failed to inspect the container before stuffing. Secondly, insofar as the duty of inspecting containers is concerned (care must be exercised by the forwarder and the carrier should exercise due diligence), it is considered by the court to be partially a duty of the forwarder. However, this is not possible under English law where the obligation of due diligence is under no circumstances delegable. Thirdly, one point worth mentioning is that a clause in the bill of lading of this particular case,¹⁵² requiring cargo-interests to inspect other parts of the vessel (the container in this case is considered part of the vessel), attempted to shift the obligation of due diligence to provide a cargoworthy container to the cargo-interests.¹⁵³ Such a clause would be null and void and so it cannot be relied upon to ascertain the liability of the cargo-interests under English law.¹⁵⁴ Accordingly, apportionment of liability is allowed under Chinese law but not under English law.

6.4.2.3 Another Approach from France

There are further inconsistencies and complexities in this area of law that have been added by judgments in certain French cases. In one case, the carrier was

¹⁵¹ Article 5 of the Provisions for Inspection of Containers formulated by SAIEC provides that beside statutory inspections, “*the parties involved in foreign trade may, if necessary, apply to the local commodity inspection authorities for inspection of container stuffing and unstuffing*”. It is believed that such an obligation may be enough to render the carrier liable for unfit containers. However, such liability may be incurred from violating the local port regulations. See for instance, *Cheikh Boutros Selim El-Khoury and Others v Ceylon Shipping Lines Ltd (The Madeleine)* [1967] 2 Lloyd’s Rep. 224, where the court held that the carrier (shipowner) failed to deliver a vessel in a seaworthy condition by the delivery date. Thus, the charterer had the right to cancel the charter. By analogy, the carrier may be liable for not supplying a cargoworthy container that did not comply with port regulations.

¹⁵² A clause stated: “*If a container has not been filled, packed, stuffed or loaded by the carrier, the carrier should not be liable for loss of or damage to the contents and the merchant shall indemnify the carrier if such injury, loss, damage liability or expense has been caused by the unsuitability or defective condition of the container which would have been apparent upon reasonable inspection by the merchant at or prior to the time the container was filled, packed, stuffed or loaded.*”

¹⁵³ *Riverstone Meat Co. Pty. Ltd v Lancashire Shipping Co. Ltd (The Muncaster Castle)* [1961] 1 Lloyd’s Rep. 57.

¹⁵⁴ Article III, r.8 of the Hague/Hague-Visby Rules.

held liable on the basis of a rental agreement for any containers supplied by the carrier rather than as a carrier *per se*, as the principles of the Hague/Hague-Visby Rules are statutorily applicable under French maritime transport law.¹⁵⁵

6.5 Conclusion

By way of a postscript, it might be desirable to deem that all containers be hypothesised legally as part of the equipment or structure within the vessel's hull. On that basis, there would no longer be any question regarding the application of the common law which in turn would give the advantage of an apparent legal solution on issues such as exercising due diligence to supply a seaworthy/cargoworthy container by the carrier rather than the shipper or consignor.¹⁵⁶ Otherwise, there is a need for a new regime to solve all of the above problems.

As mentioned above, the various jurisdictions and legal systems apply different standards of container cargoworthiness depending upon which legal principle the court follows, i.e. whether the container is considered as part of the vessel's hull or equipment, or where the obligation does not exist at all; that is, under the

¹⁵⁵ CA, Aix-en-Provence, 15 February 2007, D.M.F. 207, p.346 (*MS Matisse*). The carrier had supplied and loaded several reefer containers. On their arrival, they had been discharged by the stevedoring company. Five days after discharge from the vessel, the temperature readings showed that the temperature inside the containers had started to rise. Consequently, the cargo of meat inside the container suffered damage. The court regarded the supply of the container by the carrier as a rental agreement which obliged the carrier to supply a fit container and thus the carrier had breached his obligation of supplying a fit container. The claim was pursued by the consignee, who is not a party to the rental agreement between the shipper and the carrier. However, the court held the carrier liable under the rental contract with the shipper to be a tort vis-à-vis the consignee, and awarded the latter's claim against the carrier. Comments and notes on this case are cited in Stevens, F., 'Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers' cited as Chapter 2 in B. Soyer and A. Tettenborn, *Carriage of Goods by Sea, Land and Air: Uni-modal and Multimodal Transport in the 21st Century*, (Informa Law, 2013), at pp. 28-29, where Stevens references Bordahandy, P-J., 'The liability attached to the supply of containers by a maritime carrier', (2007) 21 A&NZ Mar LJ, pp.178-182, at f.n.15.

¹⁵⁶ Or other limitation problems.

English legal system or when the law of renting a container applies.¹⁵⁷

Therefore, when applying the Rotterdam Rules, the courts in different jurisdictions might rely on the description of the carrier's duties contained in the Hague/Hague-Visby Rules as inherited from their case law. If they do so, the results would be unpredictable.¹⁵⁸ To avoid this problem, courts must endeavour to interpret Article 14(c) of the Rotterdam Rules without reference to previous approaches. It can be assumed here that it might not be possible for the courts to come to a clear view as to the proper interpretation of the Rotterdam Rules so that the courts might refer to previous case law. The text of the Rotterdam Rules indicates all facets of seaworthiness, which concern all areas of the vessel. However, the text does not seem to consider the container as an intrinsic part of the ship. This is justifiable on the basis of the usage of the word 'and', which replaced the phrase 'including the container' in the previous draft of the Rules.¹⁵⁹

Although the obligation of exercising due diligence to provide a cargoworthy container under the Rotterdam Rules is not always required, it is required when the carrier is the supplier of the container. In other words, the carrier is not liable for an unfit container that is not supplied by him. Thus, courts, such as the Chinese courts, should not use their pre-existing case law which treats the

¹⁵⁷ Bordahandy, P-J, 'Containers: a conundrum or a concept?', (2005) II JIML, p.370

¹⁵⁸ See Wong, J., 'Container Transportation and Anomalies in the Law', [1995] 23 Australian Business Law Review, 340, pp.342-343.

¹⁵⁹ On a proposal by the Netherlands, the words 'including any container supplied by the carrier' were changed to 'and any containers supplied by the carrier'. The previous version of the seaworthiness obligation is included in Article 15, until the final redrafting when that article became Article 14. 'Article 15. Specific obligations applicable to the voyage by sea.' The current text of subparagraph (c) may easily be read as if "*any containers supplied by the carrier in or upon which the goods are carried*" are an intrinsic part of the ship. This is clearly not the intention. Therefore, a better text would be:

"(c) make and keep the holds, and all other parts of the ship in which the goods are carried and including any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation." See UNCITRAL Doc. A/CN.9/658/Add.9, at para.10. See the last section at the end of para. 6.4.1.

container as an intrinsic part of the vessel, as Article 14(c) is inconsistent with the idea that the container is part of the ship. If the container is not supplied by the carrier, it would be considered as a piece of cargo and thus not within the scope of Article 14(c), rather, Article 13. Consequently, the standard of care imposed by Article 13 (Article III, r.2 of the Hague/Hague-Visby Rules) is different from the obligation of due diligence required by Article 14 (Article III, r.1 of the Hague/Hague-Visby Rules). Therefore, applying the law of different jurisdictions would create different standards of container due diligence and would not exactly serve the goals of unification and predictability. As a result, as far as container cargoworthiness is concerned, the provisions on the obligation in Article III, r.1 of the Hague/Hague-Visby Rules should not be taken as useful guidelines for courts when establishing whether or not the carrier has exercised due diligence to provide a cargoworthy vessel.¹⁶⁰ This discussion leads to the view that the Rotterdam Rules do not regard the container as part of the vessel. In reference to the intention of the drafters of the Rotterdam Rules, the interpretation of Article 14(c) is sufficiently clear, because of how Article 14(c) and Article 80(4) should be regarded, and one should not regard the container as an intrinsic part of the ship. Thus, reference to previous case law or any differences in approach is unjustifiable.

Some jurisdictions take the approach that the supply of the container imposes a duty on the supplier as part of the rental agreement. Applying such case law would not be justified under the Rotterdam Rules. The Rotterdam Rules have

¹⁶⁰ Some authors have concluded that the majority view of the courts were probably not entirely correct. See Stevens, F., 'Liability for Defective Containers: Charting A Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers', cited in Eighth Annual International Colloquium on Carriage of Goods - Sea Transport and Beyond, 6-7 September 2012, Swansea University.

clarified¹⁶¹ the position and previous approaches are now irrelevant to the basic underlying liability in Article 14. The obligation of cargoworthiness imposed on the carrier should not be construed differently by reference to previous case law. However, the position may be less clear in respect of volume contracts when considering the container as part of the ship.

One may take the approach that applying an ongoing obligation of container cargoworthiness on the carrier until the end of the voyage would be unreasonable if the container's defect cannot be repaired. This notion should not be applied because the obligation is not absolute. It is merely to exercise due diligence to provide a cargoworthy container. So, if the refrigeration unit breaks down in circumstances where repairs cannot be carried out on board or at a port of refuge, the master of the vessel, as a last resort,¹⁶² is bound to act in the best interests of the cargo owner; for example, by selling the goods to save their value or some part thereof.¹⁶³

It is not clear whether the supply of containers by the shipper, in those countries which extend the seaworthiness obligation to the container, allows the obligation to shift to the carrier. Despite the fact that the shipper is often in a position to verify the condition of the container,¹⁶⁴ some legal systems suggest

¹⁶¹ Article 14(c) of the Rotterdam Rules makes it clear that there is an independent rule concerning container fitness so that any previous approach depending upon whether there was an obligation of container cargoworthiness is irrelevant to any question of liability under Article 14.

¹⁶² In the same sense, see *Lekas and Drivas v Basil Goulandris* (1962) AMC 2366 (American case), at p.2373. It was held that the situation might arise "*when the master of the ship has not merely the authority but, under s 3(2) of COGSA, the duty to sell cargo that is at risk of further deterioration, communicating with the owner if that is feasible, but still having both the authority and duty to if it is not*"; the principle is believed to be similar for the obligation of container cargoworthiness.

¹⁶³ See Colinvaux, *Carver's Carriage by Sea*, (Stevens & Sons, 13th ed., 1982), Vol. 2, para.1229-1235.

¹⁶⁴ See Stevens, F., 'Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers', at p.12, presented at Eighth

that the obligation of seaworthiness is an overriding obligation that is non-delegable¹⁶⁵ and cannot be contracted out of by the inclusion of clauses¹⁶⁶ that exclude the liability of the carrier for the unsuitability or the defectiveness of the container.

The Rotterdam Rules may be regarded as a success in resolving the ambiguity of the current international convention that has caused different applications to the standard of due diligence in relation to the supply of containers. Alternatively, one may argue that extending the obligation of container cargoworthiness to cover the entire voyage does not prove to be of any significant success. Because of this, the carrier does not have many choices when the container, for some reason, becomes uncargoworthy during the sea carriage. However, the carrier would be under the duty to ensure that the refrigerated container unit is

Annual International Colloquium on Carriage of Goods - Sea Transport and Beyond, 6-7 September 2012, Swansea University.

¹⁶⁵ *The Muncaster Castle* [1961] AC 806 (HL). See Bordahandy, P., 'Containers: a conundrum or a concept' (2005) JIML, 342, p. 370. Contrast with *Northern Shipping Co. v Deutsche Seereederei G.m.b.H. And Others (The Kapitan Sakhrov)* [2000] 2 Lloyd's Rep. 255, where Brooke LJ stated that: "Those responsible for the manufacture, stuffing and shipping of containers are plainly not carrying out any part of the carrier's function for which he should be held responsible. I can find nothing in the Hague Rules or at common law to make a carrier responsible for the unseaworthiness of its vessel resulting from a shipper's misconduct of which it, the carrier, has not been put on notice", at p.273.

¹⁶⁶ Bill of Lading Clauses; see for example:

"11 Merchant-Packed Containers: If a Container has not been packed by or on behalf of the carrier;

11.1 The Merchant shall inspect the container for suitability for carriage of Goods before packing it. The Merchant's use of the container shall be prima facie evidence of its being sound and suitable for use;

11.2 The Carrier shall not be liable for loss of or damage to the Goods caused by:

- (a) The unsuitability or defective condition of the Container or the incorrect setting of any refrigeration controls thereof, provided that, if the Container has been supplied by or on behalf of the Carrier, this unsuitability or defective condition would have been apparent upon inspection by the Merchant at or prior to the time when the Container was packed" (MSC B/L).

See also "9. Containers:

- (1) Goods may be stuffed by the Carrier in or on Containers and goods may be stuffed with other goods;
- (2) The Merchant shall carefully inspect any Container supplied by the Carrier to ensure that it is suitable and satisfactory in all aspects for the goods being shipped. The Merchant shall defend, indemnify and hold harmless the carrier against any loss, damage, claim, liability or expense whatsoever caused by packing, checking, stowage and securing of the goods stuffed in a container, or by failure to inspect the container properly, by or on behalf of the Merchant" (ACL B/L).

operating correctly and with the limited on-board resources of men and equipment, he still should be able to “*take steps to rectify the malfunction*”.¹⁶⁷ It is sufficient to say that once the obligation of cargoworthiness is applied to the container, it will complement the standard of care required by Article III, r.2,¹⁶⁸ to prevent the cargo from being damaged, as, in practice, most of the container’s unfitness arises from the time prior to stuffing the container with the cargo.¹⁶⁹

¹⁶⁷ See, Springall, R., ‘The transport of goods in refrigerated containers: an Australian perspective’, [1987] LMLCQ, 216, p.220. It is suggested that there could be an issue of whether there is liability under Article 14 even if the carrier is regarded as having satisfied Article 13. Chapter Two suggests that the ongoing obligation of due diligence might increase the level of due diligence. Thus, under Article 14, the carrier will be required to equip his ship with more spare parts than that which was required under the limited obligation in Article III, r.1 of the Hague/Hague-Visby Rules. See para. 2.14.1, at p.128. It must be noted that this does not mean that there cannot be situations when there could be liability under both Rules. For instance, if the carrier commits a failure to rectify an obvious and easily remedied defect in a container which is causing damage to the cargo during the voyage, it is assumed that there would be liability under both Articles 14 and 13 of the Rotterdam Rules.

¹⁶⁸ Cf. Stevens, F., ‘Liability for Defective Containers: Charting a Course between Seaworthiness, Care for the Cargo and Liabilities of Shippers’ cited as Chapter 2 in B. Soyer and A. Tettenborn, *Carriage of Goods by Sea, Land and Air: Uni-modal and Multimodal Transport in the 21st Century*, (Informa Law, 2013), at p. 34. Some writers regard providing a defective container as a potential breach of Article III, r.2 of the Hague/Hague-Visby Rules. This suggests that overlap might possibly occur between the seaworthiness and general care obligations. For instance, Stevens is not regarding the supply of a defective container as an act of management for which the carrier would not be liable (apart from unseaworthiness) under Article IV, r.2 of the Hague/Hague-Visby Rules but as a breach of Article III, r.2 of the same rules. Overlap would now seem to be much more likely under the Rotterdam Rules.

¹⁶⁹ The carrier should take the necessary precautions to “... *properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods*” as per Article 13.1 of the Rotterdam Rules. Similar language is used in Article III, r.2 of the Hague/Hague-Visby Rules. For example, when carrying sensitive cargo, precautions and care should be taken for temperature changes (e.g. *Imperial Commodities Corp v Maria Auxiliadora* [1988] A.M.C. 568 (S.D.N.Y. 1986) (American case). See also *Mayhew Foods Limited v Overseas Containers Ltd* [1984] 1 Lloyd’s Rep. 317, where the carrier had set the temperature at 2° - 4°C instead of the required -18°C. The Commercial Court found that on the form of the bill of lading in question, the Hague/Hague-Visby Rules did not apply during the period prior to shipment or after discharge. As the ocean carrier was unable to show that the loss occurred outside the period covered by the Rules, he was held liable for the out-turn damage in accordance with the Rules.

Chapter Seven

Conclusion

*“The advances in technology unavoidably outpace prescriptive regulation. Ships should be built to meet demands and challenges, and the innovation inherent in their design today will find its way into the mainstream design of tomorrow. As such, there is a need to devise a regulatory framework that will evaluate and regulate designs for safety.”*¹

1. Introduction

Throughout the previous chapters it was shown that in recent decades there have been tremendous technical changes (mainly in the construction and operation of ships) that have driven carriage of goods and commercial changes. These developments demand constant changes to the international regime.² The Rotterdam Rules seek to modernise and update the existing legal regimes that govern the carriage of goods by sea and which for decades have been criticised for being generally out of date, fragmented and uncoordinated with other inland-based transport regimes.³ They are intended to supersede the Hague/Hague-Visby Rules by establishing uniform international rules to allocate liability for the risk of loss of or damage to goods carried by sea. This chapter summarise the discussion in previous chapters.

It has been demonstrated in the previous chapters that the Rotterdam Rules made changes to the current law (presently the Hague/Hague-Visby Rules).

¹ Koji Sekimizu, Secretary-IMO, ‘Future Ship Safety Symposium’, International Maritime Organization HQ, 10-11 June 2013.

² The initiative for changes also derived from the criticism on the unbalance bargaining power of the carrier, a cargo-interest generally has little discretion in negotiating the terms of bills of lading.

³ United Nations Resolution 63/122: http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Rotterdam_status.html

Under the latter, the obligation to exercise due diligence to make the vessel seaworthy and cargoworthy must be exercised only before and at the beginning of the voyage. Under the former, the obligation is extended to the entire sea voyage and the carrier's obligation is to ensure that every place in which goods are carried is 'cargoworthy' including not only the traditional cargo holds, but also containers supplied by the carrier.

It has been demonstrated that the Hague/Hague-Visby Rules do not contain an express detailed provision in relation to liability. Article IV provides the carrier's exonerations from liability for breach of the carrier's obligation of seaworthiness provided that he exercised due diligence to provide a seaworthy vessel. However, the allocation of burden of proof is not clearly regulated, except that Article IV, r.1 provides that if the unseaworthiness of the vessel caused loss or damage to the goods, the burden is on the carrier to prove that he exercised due diligence. Similarly, under Article IV, r.2, the burden is on the carrier to prove that the loss or damage was caused by an excepted peril. In Article 17 of the Rotterdam Rules, beside the exonerations from liability, the navigational fault and management of the vessel are removed. The allocation of the burden of proof and the basis of liability of the carrier are codified to create a link between the (breach of) the seaworthiness obligation of the carrier and his liability. Furthermore, unlike the Hague/Hague-Visby Rules, the Rotterdam Rules allow for a proportion of liability for loss caused by incidents arising from a combination of causes, one of which may fall outside of the carrier's control.

Furthermore, one of the most advanced improvements in the shipping industry is the transportation of cargo by containers. It is the extension of the liability regime to multimodal transport that makes the Rotterdam Rules reach beyond

the Hague/Hague-Visby Rules.⁴ This study analyses how the wide scope of the Rotterdam Rules, pursuant to a contractual approach, covers the inland carriage of goods in addition to sea carriage (door-to-door carriage). Such an extension means that the Rotterdam Rules and other (non-sea) inland unimodal conventions overlap. As such, a direct/indirect impact on the obligations and the liability related to seaworthiness under the Rules is likely.

Finally, it is important to note that seaworthiness is intimately associated with public law (the prevailing standards of maritime safety consist of STCW, MARPOL, SOLAS and so on). It is therefore essential to identify their potential impact on the standard of seaworthiness. Whether the continuing obligation of seaworthiness will improve safety standards is a point addressed in this study.

This raises the following question: as a legal framework, are the Rotterdam Rules sufficiently appropriate to govern the law related to seaworthiness? Have they accommodated the changes in technology and the development of commercial practice? Have updates in the Rotterdam Rules met the changes in the shipping industry? Alternatively, would the adoption of a similar approach to the Rotterdam Rules, without the ratification of them, be a better solution to govern the obligation of seaworthiness?

This study and others⁵ demonstrate that there are several gaps in the present law in respect of seaworthiness. The law is dated and a lack of uniformity exists regarding the rules governing seaworthiness. The Rotterdam Rules seek to close those gaps, especially in light of the failure of the Hamburg Rules, and the

⁴ The Hague/Hague-Visby Rules apply to 'tackle-to-tackle' transport operations, Art. I(e).

⁵ Nicholas, A., 'The duties of carriers under the conventions: care and seaworthiness' cited as Chapter 6 in R. Thomas (ed.), *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa, 2010), p.117. See para. 2.14.1, at p.132.

subsequent increase in national hybrid regimes that aim to update the law in this area have contributed largely to the present problematic situation.⁶

This study demonstrates the potential implementation of the new Convention and question whether its provisions would serve as a better solution as regards the development of seaworthiness (rather than ratifying a totally new regime) . There have been several studies attempting to address the effect of the Rotterdam Rules on different areas of the law of carriage of goods by sea. Yet no particular study seeks to address the laws in detail with respect to seaworthiness under the Rotterdam Rules in relation to the current regime. The Hague/Hague-Visby Rules might have been sufficient when they were first introduced, although it can be said that on some occasions, as far as the cargo-interests are concerned, the Rules are not fair, e.g., the duration of exercising due diligence, burden of proof, liability for unfit container, apportionment of liability, and so on. Those problems were in the minds of the drafters when drafting the convention, and as a result, they introduced those changes in the context of the Rotterdam Rules. Whether such changes meet the current and future development of shipping, is one objective of this study. This Chapter (Seven) summarises, both under the Hague/Hague-Visby Rules and the Rotterdam Rules, the obligation to exercise due diligence, the inclusion of container carriage that facilitates multimodal carriage also being covered, the burden of proof, the liability of the carrier and the resulting effect of shipping standards on seaworthiness.

⁶ See, for example, Sturley, M., 'The development of cargo liability regimes' cited in H. Tiberghien (ed.), *Cargo Liability in Future Maritime Carriage*, (Hasselby 1997), at pp.60-64.

7.1 The Obligation to Exercise Due Diligence under the Hague/Hague-Visby Rules

It was discussed in Chapter Two that, under charterparty contracts, e.g. where the Hague/Hague-Visby Rules are incorporated,⁷ and, in a practical legal sense, bills of lading, the carrier is under a duty to exercise due diligence while the vessel is on her way to the loading port.⁸ However, this is not always the case, especially under liner voyage contracts where the Hague/Hague-Visby Rules are applicable.⁹ Hypothetical examples were given to demonstrate the logic behind the phrase 'before the voyage' in liner voyage carriage as being the time of actual commencement of the loading.¹⁰

As discussed, the period of the duty to exercise due diligence ends, according to Article III, r.1, 'at the beginning of the voyage', however, the law does not define the exact moment when the voyage begins. Accordingly, a carrier would not be liable for cargo damage because his obligation to exercise due diligence under Article III, r.1 would be presumed to have been fulfilled in some cases, i.e. when damage occurs after the port control has instructed the vessel to sail to the anchorage area before her final sailing. Thus, the carrier would be able to invoke the exemption under Article IV, r.2(a). Arguably, the carrier has not fulfilled all the pre-departure activities, e.g. trimming the cargo, which are required under the duty to exercise due diligence and, therefore, should not be excused from liability for unseaworthiness.¹¹ Also, if the damage that is caused by not fulfilling the Article III, r.1 obligation is traceable to the beginning of the

⁷ See para. 2.3, p.84.

⁸ For the origin and the definition of the words 'Due diligence', see para.2.3, at p.82 and para.2.4, at p.85.

⁹ See para. 2.5, pp. 89-90, for the differences between in the commencement of the voyage between voyage and time charters.

¹⁰ See, para.2.6.1, at p.98.

¹¹ It must be noted that some other matters which would relate to the act of management if they cause damage and the carrier may still be allowed to rely on the defence.

voyage but the damage occurred after the ship had sailed, it would render the vessel unseaworthy.¹²

The author does not agree with the argument put forward by Carver that the 'beginning of the voyage' is a period of time encompassing the process of entering into a new action. Carver's notion implies a voyage by stages, which is restricted under the Hague/Hague-Visby Rules. The author also disagrees with Clarke's opinion that the voyage should no longer be beginning but underway when the vessel has no further purpose at port. Instead, the author opines that the commencement of the voyage must be determined by the satisfaction of all requisite conditions for sailing such that the vessel is completely ready for sea.¹³

7.1.1 What can be done to improve the current situation?

In determining when the voyage begins, it is necessary to consider all of the relevant factors in order to be fair to the cargo-interests. Accordingly, in Chapter Two, factors were suggested in line with Tetley's point of view,¹⁴ that the authorities which determine the commencement of the voyage can be separated into two schools of thought. First, the operational requirements,¹⁵ which embrace (i) undocking, e.g. a vessel is considered not to have begun her voyage when the lines of the vessel are ashore; (ii) breaking ground and manoeuvring, e.g. when the vessel is able to swing around; and, (iii) the command or control of the vessel, e.g. a vessel is not considered to have begun its voyage if the shore personnel have control of the vessel or have restricted

¹² See para.2.6.2, at p.100.

¹³ See the argument put forward by Clarke at Chapter Two, para.2.7.2, at p.115.

¹⁴ See Chapter Two, para.2.7, at p. 104, for factors determine the commencement of the voyage.

¹⁵ See Chapter Two, para.2.7.1, at p.104.

the vessel to sail at night. The second school of thought focuses on legal requirements,¹⁶ e.g. when the vessel has all its necessary certificates and clearance. The argument put forward in Chapter Two concerning these factors concludes that the vessel should not be considered to have begun her voyage until all the operational *and* legal requirements are fulfilled.

Improving current laws relating to seaworthiness does not require changing legal precedents. Rather, one should consider all the practical requirements referred to in the case law. It should be noted that it is not really a matter of what is left undone. It is a question of fact and intention as to whether the vessel has sailed. It can be said that the timing of an event may make the vessel unseaworthy rather than the simple question of whether further preparations need to be completed. So, if preparations are incomplete and, as a result, the cargo is damaged, the damage is due to unseaworthiness. In contrast, if preparations are incomplete and the ship sails and then an unrelated event occurs that causes damage, such damage can come within Article IV, r.2(a) of the Hague/Hague-Visby Rules.

Alternatively, by extending the obligation of due diligence to the entire voyage, the termination of the obligation is not tied to the time at which the voyage begins. This position has been adopted in the Rotterdam Rules. Whether the Rotterdam Rules have completely solved the problem without creating another, was discussed in Chapter Two, Part II.

¹⁶ See Chapter Two, para.2.7.2, at p.112.

7.2 The Obligation to Exercise Due Diligence under the Rotterdam Rules

Article 14 of the Rotterdam Rules is similar to Article III, r.1 of the Hague/Hague-Visby Rules, however new words, such as ‘during’, ‘keep’, and ‘container’ in Article 14 may raise questions regarding the potential effect they have on the obligation of seaworthiness.

The main difference in language between the Rotterdam Rules and the Hague/Hague-Visby Rules that is expected to change the risk of liability on the carrier is the addition of the word ‘during’ to the carrier’s obligation to exercise due diligence. Arguably, the Rotterdam Rules remove the uncertainty as to the moment at which the obligation ends at the loading port, namely ‘*before and at the beginning*’ of the voyage. However, the grey area may now have shifted to the ‘end’ of the voyage. This raises a question: When is the exact moment at which the duty comes to an end?

7.2.1 The New Uncertainty under the Rotterdam Rules

In Chapter Two, Part II, it was argued that the Rotterdam Rules do not define when the obligation ends. Accordingly, courts (and at the least, scholars) will need to deal with the word ‘end’, as they previously dealt with the word ‘commencement’.¹⁷ In Chapter Two,¹⁸ the author doubted whether the ‘end’ of the obligation coincides with the end of the cargo discharge. While discharge of

¹⁷ Whilst case law on ‘due diligence’ has traditionally no connection with any issue relating to the ‘end’ of the voyage, charter party cases relating to a ship’s ‘arrival’ may now become relevant.

¹⁸ See para. 2.13, at p.124

the cargo is one of the aspects of cargo management in Article 13 of the Rotterdam Rules, the word 'discharge' was not mentioned in Article 14. Further, discharge of cargo from the container, e.g. de-stuffing, can take place far away from the port. It was suggested by analogy to decided cases on the Hague/Hague-Visby Rules as to 'commencement' of the voyage, that the voyage may be said to come to an end once the vessel enters the 'commercial limits' of the discharging port.¹⁹

It was further discussed in Chapter Two²⁰ whether an act of the carrier which caused damage to the cargo should be classified as a failure to fulfil his obligation under Article 14, e.g. negligence as regards the management of the ship, or as a failure to fulfil his obligation under Article 13 of the Rotterdam Rules, e.g. negligence as regards the cargo. It was suggested that acts such as failing to observe safety rules and regulations during the voyage which could make the ship unseaworthy or acts which endanger the safety of the vessel and not merely damage the cargo, can now be regarded as falling within Article 14 of the Rotterdam Rules. In comparison, acts which only affect the carried cargo and do not endanger the safety of the vessel, can fall within Article 13. The

¹⁹ One might argue that the voyage ends when the ship is moored and under the control of shore personnel. It is a well-known practice that the minute the vessel enters the port limit, she would be subjected to the control of the port authority. Thus, the master would not have the full control of his vessel. Further, the vessel may be subject to the port authority regulations which differ from the regulations governing the open sea voyage. Such regulations would impose some restrictions on the vessel, e.g. the maximum speed should not exceed 6 nautical miles. Thus, arrival of a vessel is considered when the ship is under the control of the port authority; that is, when the ship enters the commercial limit of the port.

²⁰ See Chapter Two, sub-para. 'Act of the carrier on voyage: Exercising due diligence or care of cargo', at p.145

importance of making such a distinction²¹ was made clear because, if the preconditions of Article 19.1 are met, the carrier and any maritime performing party will be jointly and severally liable to the limit provided in the Rotterdam Rules.²² This will enable the court to determine the extent to which they may hold the sub-contracted inland carrier liable. Second, it is important to know whether a contract of carriage was a volume contract, as parties to volume contracts are allowed to agree upon greater or lesser obligations and liabilities than those provided by Article 14(c) of the Rotterdam Rules and a carrier may therefore agree to derogate from his cargoworthiness obligation.²³

Then,²⁴ in Chapter Three, it was argued that the standard of proving damage caused by unseaworthiness would be easier than proving damage caused by a failure to care for cargo.²⁵ This may mean that the claimant bears a lesser burden when proving the causal link between loss and unseaworthiness, as compared to proving the causal link between loss and a breach of the duty to care for the cargo.

7.2.2 Solution to the New Uncertainty

Assuming that the obligation ends on the completion of discharging the cargo, a suggestion for completely avoiding the uncertainty as to when the obligation

²¹ See Chapter Two, sub-para. 'The importance to make distinction', at p.152.

²² The Rotterdam Rules allow a maritime performing party to carry out or undertake to carry out any of the carrier's responsibilities during the port-to-port leg of the transport operation.

²³ See, sub-para. 'The importance to make distinction', at p.152.

²⁴ See Chapter Three, sub-para. 'The Importance to make Distiction', at p.153

²⁵ The text 'probably caused' in Article 17(5) is intended to give a somewhat lower standard than the normal causation standard in proving seaworthiness by the carrier.

ends was put forward in Chapter Two²⁶; that is, for the parties to agree contractually on this point, as long as there is genuine agreement for discharge to be performed by the cargo-interest.²⁷ The Rotterdam Rules acknowledge some industry practices e.g. free-in-free-out-stowed,²⁸ and the parties may agree to the cargo-interests (shipper or consignee)²⁹ being in charge of performing the loading, handling, stowing or unloading operations.

7.2.3 The Strictness of the Obligation

Further, as highlighted in Chapter Two,³⁰ the on-going duty might impose extra activities for the fulfilment of the due diligence obligation that the carrier must bear in mind when planning the voyage *before* its commencement. In deciding whether the carrier exercised the required pre-voyage due diligence, the court, arguably, should bear in mind the post-commencement obligation.

Although the pre- and post-commencement due diligence obligations appear to be the same, there are significant differences in practice. Their exercise by the carrier is dictated by factors such as (i) the nature of the defect,³¹ (ii) the

²⁶ See, sub-para. 'Rebutting the Existence of the Peril', at p.192

²⁷ It depends on terms of the contract of carriage whether the obligation ends at the arrival to the port limit or when the cargo is fully discharged. However, for the latter, it also depends on the terms of the contract of carriage whether the discharge is the ship's rail, quay or warehouse or whether lighters are involved. (See, i.e. *Fitzgerald v Lona (Owners)* (1932) 49 T.L.R. 77). Similarly, this would also depend on the custom of the port regulations where the custom of the port may extend the actual work of discharge to be performed by one of the parties beyond the ship's rail. This might be agreed upon by contract to be handled by the receiver or the charterer. (See, i.e. *Palgrave, Brown & Son v S.S. Turid* [1922] a A.C. 397).

²⁸ See, para. 'The End of the Obligation', at p.126.

²⁹ The Rotterdam Rules, Article 13(2).

³⁰ See para. 2.14.1, at p.130

³¹ See para 2.14.2.1, at p.135

possibility of causing damage to the cargo,³² and (iii) access to a necessary facility to remedy the defect and reinstate the vessel's seaworthiness.³³

The carrier, most likely, will be held liable if he did not exercise due diligence in relation to a defect that manifested during the voyage and either (i) it was not repaired even though it was repairable with use of the limited resources on board; or, (ii) he did not obtain the spare parts or summon the services of expert technicians by calling at the nearest supply station or port,³⁴ provided that the ensuing delay³⁵ would be reasonable.³⁶ The position, however, would be the same as that under the Hague/ Hague-Visby Rules when a defect manifests itself after the beginning of the voyage but is not repairable during the voyage. To conclude, the test for the on-going due diligence obligation under the Rotterdam Rules should be '*Would a prudent shipowner, if he had known of the defect, have continued the voyage without effecting any possible repairs?*'³⁷

In practice, whether the carrier has exercised due diligence to 'keep' the vessel seaworthy during the voyage will be left entirely for the courts to decide on a case-by-case basis. There may be numerous situations, and four potential (hypothetical) scenarios were examined in Chapter Two in respect of the

³² See para. 2.14.2.2, at p.136

³³ See para. 2.14.2.3, at p.139

³⁴ See para. 2.14.2.3, at p.139

³⁵ Under contracts of carriage by sea, where cargo loss has been caused by delay, there have been reasonably direct discussions on whether to impose liability on the carrier or not. However, in the context of pure economic loss caused by delay in sea carriage, the position is different. The Rotterdam Rules, as part of the 'general' liability regime, seek to address this issue by adding a separate limit of liability for pure economic loss resulting from delay.

³⁶ Maintenance is part of exercising due diligence and it is equal to the limited due diligence pursuant to Article III, r.1 of the Hague/Hague-Visby Rules. When discharging due diligence prior to sailing, most of the burden of seaworthiness is considered fulfilled, and what is left during the voyage is considered less burdensome. For further details, see Aladwani, T., 'The Supply of Containers and "Seaworthiness - The Rotterdam Rules Perspective', (2011) JMLC, 185-209, pp.206-207.

³⁷ See para. 2.14.2.3, at p.141

exercise of due diligence for defects that manifested themselves after the commencement of the voyage and which, by definition, were not discoverable by exercise of due diligence before and at the commencement of the voyage. These hypothetical scenarios concern (a) a defect repairable at sea³⁸; (b) a repairable defect that would take too long to be repaired and would cause unreasonable delay³⁹; (c) a defect repairable only temporarily⁴⁰; and, (d) a defect repairable only if the vessel is at port.⁴¹

7.2.4 A New Obligation on the Carrier

The on-going obligation of due diligence under Article 14 arguably makes the Rotterdam Rules a stricter system; however, they demand further action to mitigate and minimise the consequence of a defect caused by unseaworthiness alongside exercising due diligence in providing a seaworthy vessel.⁴²

Although the current law can cover mitigation requirements,⁴³ as far as the unseaworthiness cases are concerned, mitigation efforts have not been

³⁸ See para. 2.16.1, at p.143.

³⁹ See para. 2.16.2, at p.145.

⁴⁰ See para. 2.16.3, at p.157.

⁴¹ see para. 2.16.4, at p.158

⁴² See para. 2.16.1, at p.144.

⁴³ See *Notara and Others v Henderson* (1872) LR 7 Q.B. 225 (Ex Ch.). A cargo of beans was wetted by salt water after a collision which was not the fault of the carrier. The cargo was offloaded while repairs were effected but no action was taken to dry the water from the cargo before the ship resumed the voyage. The court held that the master became an 'agent of necessity' who should have minimised rot by drying the beans, and then charged such expenses to the cargo-interests. Since the master failed to do so, the carrier was liable for the extra damage suffered. If the carrier had dried the beans, he would have been reimbursed for the particular charges from the cargo underwriters under the sue and labour clause in the cargo policy, as damage caused by a collision is an insured risk. Case cited in M. Cohen, 'Particular charges in carriage of goods by sea and marine cargo insurance', (2004) LMCLQ 453, at pp.454-455. It must be noted here that in the same article, it was concluded that "*Of course, if the owners have breached the contract of carriage, say, by improperly stowing the cargo or by failing to exercise due diligence to make the vessel seaworthy, and extra expenses are incurred*

subjected to judicial consideration. The author is of the opinion that,⁴⁴ if the contract is governed by the Rotterdam Rules, the court might distinguish between a loss caused by not mitigating and a loss that occurred despite the exercise of due diligence during the voyage, in order to decide how much the carrier will be liable for. The carrier would not be responsible for inevitable damage caused by a defect that emerged during the voyage provided that due diligence is exercised before and during the voyage without delay. However, the carrier would be liable for not mitigating the damage while repairing the defect, if such mitigation would prevent further damage than that inevitably occurred until a repair is completed.

Finally, it was mentioned above⁴⁵ that in deciding whether the due diligence obligation has been exercised when a defect emerged at sea depends on several factors, including the extent of defect (i.e., leakage) and the possibility of causing damage to the cargo etc. If mitigation is also taken as a facet of the obligation, then it should be considered when deciding the seaworthiness of the vessel.

If mitigation is regarded as part of the due diligence obligation, the impact of the extension of the obligation would potentially be greater on the carrier.⁴⁶ It is probably accurate to say that an additional obligation to mitigate⁴⁷ shifts a

in overcoming these problems in order to protect the cargo from injury, the funds spent are not recoverable from the cargo interests” at p.454.

⁴⁴ See para. 2.16.1, at p.144.

⁴⁵ See para. 2.14.2, at p. 135.

⁴⁶ In Baatz, Y. et al., *The Rotterdam Rules, A practical annotation*, (2009, Informa), the authors argued that the obligation of due diligence under the Rotterdam Rules is arguably stricter than the Hamburg Rules, para.14.05.

⁴⁷ Knud Pontoppidan, the Executive Vice-President of Moller-Maersk AP, discussed such point in the final text of the Rotterdam Rules at the CMI's conference in October 2008. He expressly acknowledged some of the principal ways in which the Rotterdam Rules impose greater

portion of the risk involved in the carriage of goods towards the carrier because a carrier is more likely now to be liable for loss, damage or delay caused by his failure not only to exercise due diligence to maintain the vessel in a seaworthy condition throughout the voyage, but also for cargo damage that would have been prevented if due diligence was exercised in mitigating such damage.⁴⁸ Consequently, the conclusion can be drawn that extending the exercise of due diligence should not create an extra burden on the carrier as it is being familiarised throughout the shipping industry. This raises the following question: Are the prevailing standards of maritime safety an alternative to the on-going obligation of due diligence?

7.3 Effect of Shipping Standards on Seaworthiness

7.3.1 The Relevance of Shipping Industry Standards on the Obligation of Seaworthiness

The discussions in the preceding Chapters raised the question: Are the prevailing standards of maritime safety an alternative to the on-going obligation of due diligence? In answer to this, reference to two of the most important IMO shipping conventions, SOLAS and the STCW convention, was made in Chapter Four. SOLAS sets out rules and regulations that are principally concerned with the strength of a vessel and the reliability of its machinery and equipment, as

responsibility on carrier (as compared to the Hague/Hague-Visby Rules), including the loss of the navigational fault exception and the larger increase...etc.

⁴⁸ The court may arrive at the conclusion that the defect is repairable on board (using the basic available tools and without the need for expert) but the carrier has chosen to call on to nearest port of call to effect a repair. If that was the case, the carrier would be liable for the damage that could have been saved should minimal (temporary) repairs be made to mitigate the damage while steaming toward the port of repair.

well as the management and security of the vessel,⁴⁹ and the STCW convention provides minimum standards for formal qualifications including training, certification and watchkeeping capabilities.⁵⁰ It can be optimistically concluded that shipping industry standards are proving to be of considerable importance as the seaworthiness of all types of vessels is, to some extent, a result of good seamanship and proper shipping practices, which form a benchmark to determine the standard of seaworthiness.⁵¹

That being said, Member States apply these conventions with varying degrees of strictness.⁵² Due to poor resources, supervision, enforcement, or inefficiency of the convention standards themselves, some Member States are more lax in applying these conventions. Consequently, the benchmark that ascertains seaworthiness is lowered, and thus, seaworthiness cannot be guaranteed, at least by the relevant conventions alone. Further, those regulations, especially technical ones such as those involving safety equipment, are reactive rather than proactive.⁵³ As a result, in following them, the carrier will exercise a lower

⁴⁹ See para. 4.3, at p.279.

⁵⁰ See para. 4.4, at p.292.

⁵¹ See para. 1.2, at p.53, f.n. 12. Further, see the introduction of Chapter Four, at p.274.

⁵² See para. 4.5.1, at p.309. Shipping companies might be encouraged to register their vessels in flag states which have neither administration nor independent surveyors, which have promulgated no laws, decrees, orders or regulations and have set no standards for seaworthiness. See Sass, C. A., 'The Enforcement of Safety Standards on Board Merchant Vessels', pp. 66-77, delivered as a paper in the Fitness at Sea: An International Conference on Seaworthiness, (9-10, 1980) held at Newcastle University.

⁵³ See sub-para. 'What can a shipowner do to overcome the inefficiencies of SOLAS?' at p. 291. The Secretary of the General International Chamber of Shipping said: 'It is often said that advances in the technical regulation of shipping tend to follow a casualty - that the maritime sector responds to, rather than anticipates its problems.' Horrocks, C., 'Challenges Facing the Shipping Industry in the 21st Century', Sixth Annual Cadwallader Memorial Lecture (15 Sep. 2003), pp. 3-4.

standard of due diligence than that which should have been followed in the first place.⁵⁴

7.3.2 The Potential Legal Implications of the Industry

Standards on Seaworthiness

- The Example of SOLAS

If SOLAS or its implementation proves to be deficient, despite the fact that the carrier has complied with it, he will, as a result, still not have exercised due diligence in providing a seaworthy vessel even though the inadequacy was a result of the deficiency of the Convention and not of the shipowner's action or omission.⁵⁵

The consequence for non-compliance with industry regulations is unclear; thus, their legal bearing and practical effectiveness on the obligation of due diligence to provide a seaworthy vessel will vary from one carrier to another and from one State to another.⁵⁶

7.3.3 What can be done to improve the current situation?

⁵⁴ See sub-para. 'What can a Shipowner do to Overcome the Inefficiencies of SOLAS?' at p. 291. The same point was explained in Aladwani, T., 'Effect of Shipping Standards on Seaworthiness', (2011) EJCCL, 33-45, p.37.

⁵⁵ See sub-para. 'The Impact of the Limitation of SOLAS on the Obligation of Due Diligence', at p.285, for discussion of *The Eurasian Dream* case. See further for *The Kapitan Sakhrov* case at p.287.

⁵⁶ It was demonstrated that SOLAS allows the carrier some discretion in deciding on the amount of safety equipment for each particular ship. It was suggested that the carrier and his crew should exercise their seamanship knowledge in order to overcome the deficiencies of SOLAS. see sub-para. 'The Impact of the Limitation of SOLAS on the Obligation of Due Diligence', at p. 289.

As argued above that in Chapter Four, SOLAS is not sufficient to govern physical matters of the vessel that relate to her seaworthiness. The carrier should continuously draw on his specialised knowledge regarding the fitness of his vessel and, by doing so,⁵⁷ will know the standard of care necessary in order to fulfil the obligation of due diligence. It was suggested that an owner, when appointing new crewmembers on his ship, must exercise due diligence to ensure the competence of the crew by taking steps such as checking the appropriate certificate of competency and other training certificates.⁵⁸ The carrier should also inquire about his crewing experience and examine his seaman's book. All of the above should be further explored and verified by taking up references of the interviewee and, in particular, by consulting his/her previous employers.

It was suggested⁵⁹ that exercising due diligence on a continuous basis will first, enable the carrier to identify the 'risk' of unseaworthiness that may be caused by, for example, an insufficient amount of safety equipment; and, secondly, allow the carrier to rectify any shortage that has arisen by mere compliance with the minimum amount of equipment required by industry regulations, e.g. SOLAS. Consequently, the carrier will establish safeguards that will, in turn, avoid loss or damage from unseaworthiness.

⁵⁷ See sub-para. 'What can a shipowner do to overcome the inefficiencies of SOLAS?' at p.290. Knowledge is known exclusively to the carrier/shipowner, such as the stability of the vessel. See recent case, *Onega Shipping & Chartering BV v JSC Arcadia Shipping (The SOCOL 3)* [2010] EWHC 777. The improper stowage of cargo had affected the vessel's overall stability on departure from the last loaded port in Finland. This was an aspect that only the chief officer and master would have known about, not the charterers. The Judge, Mr Justice Hamblen found that there had been a failure on the part of the master and chief officer to supervise the cargo stowage properly with the ship's stability and ultimate seaworthiness in mind. See also Donaghy, T., 'There goes the deck cargo', (12 Nov. 2010), Maritime Risk International, 1-2, p.1.

⁵⁸ See para. 4.4.1, at p. 295. See also, p.298.

⁵⁹ See sub-para, 'What can a shipowner do to Overcome the Inefficiencies of SOLAS?' at p. 291-292.

It was further argued⁶⁰ that it is not very difficult for a court to inquire or obtain information regarding a particular crewmember or training institution and whether the crewmember has received the minimum training required by the STCW Convention. This information can be obtained from the 'Direct access to certificate verification database' that is maintained by Contracting States to the STCW Convention. Further information can be obtained by expert investigation, e.g. by visiting the marine institution where the crewmember in question allegedly received his training.⁶¹

A point suggested in Chapter Four⁶² was that, although the standard of due diligence might be increased if shipping industry standards are developed and improved, the IMO still needs the authority to verify that Flag States actually implement the conventions fully and properly. A case in point is the so-called 'white list' of Contracting States deemed to be giving full and complete effect to the revised STCW Convention's provisions.⁶³ Port State Control inspectors are expected to be increasingly targeting ships flying Flags of countries that are not on the 'white list'.⁶⁴ It was submitted that the 'white list' principle should be applied to other conventions, e.g. SOLAS.

⁶⁰ See Chapter Four, para.4.4.1, at p.300.

⁶¹ See Chapter Four, para.4.4.1, at p.300. See, the discussion regarding *The Patraikos 2* [2002] 4 SLR 232 (Singapore High Court, Admiralty Division) where an expert witness visited the Marine School of the crew member in question.

⁶² See para.4.5.2, at p.313.

⁶³ The White List was published by IMO following the 73rd session of the Organization's Maritime Safety Committee (MSC) meeting from 27 November to 6 December 2000. Cited on IMO website: <http://www.imo.org/OurWork/HumanElement/TrainingCertification/Pages/STCW-Convention.aspx> (last visited 18.9.2014).

⁶⁴ Cited on IMO website: <http://www.imo.org/OurWork/HumanElement/TrainingCertification/Pages/STCW-Convention.aspx> (last visited 18.9.2014). See para. 4.5.1, at p. 311.

In the final paragraph of Chapter Four,⁶⁵ the implications of the extended obligation and whether it involves a non-delegable duty were discussed. If the on-going obligation of due diligence does involve a non-delegable duty, this means that simple crew negligence rendering a ship unseaworthy, for example, would be sufficient to make the shipowner liable, quite apart from any failure to comply with regulations directed at the employer or operator. This means that greater emphasis should be placed on risk rather than the direct operation of particular standards.

It remains to be seen whether the advent of the Rotterdam Rules and the on-going due diligence obligation, will lead to shipowners being proactive in furnishing their vessels to a higher standard, i.e., adopting new regulations of the industry voluntarily and immediately, rather than at a later stage and only where obligatory.

7.3.4 Potential Effect of the Rotterdam Rules on the Obligation of Seaworthiness in Light of Shipping Industry Standards

For newly emerged regulations, there is usually flexibility as regards compliance,⁶⁶ and shipowners are given unnecessary time to comply with regulations, especially during the non-compulsory phase, e.g. regulations

⁶⁵ See the hypothetical example given in sub-para., 'The Implication of Shipping Standards and Crew Negligence', p. 323, in support of this suggestion.

⁶⁶ For example, during the phasing out of single hull tankers, category 2 and 3 vessels built in 1984 or later were allowed to sail until 2010. See 'IMO to avoid flag sanctions', *Lloyd's List*, 1 September 1998.

related to fitting of radar equipment, which later become compulsory.⁶⁷ Further, the IMO does not penalise shipowners for failing to comply.⁶⁸

As argued in Chapter Four,⁶⁹ the case would be different under the Rotterdam Rules. The ongoing obligation will improve the position of cargo-interests for many reasons. On the one hand, the effect of the Rotterdam Rules, if incorporated into the bill of lading or carriage contract, will set aside any flexibility in shipping industry regulations as regards their compliance. The obligation to exercise due diligence to make the vessel seaworthy 'at the beginning of, and during the voyage' will amount to an express clause such as clause 52 of Shelltime 4 and the due diligence obligation 'during the voyage' may surpass the granted flexibility to comply with regulations, as seen in *The Elli and The Frixos*.⁷⁰ Accordingly, the ongoing seaworthiness obligation under the Rotterdam Rules might equate to clause 52 of Shelltime, which imposes a warranty on the carrier that implicitly applies to the future as regards compliance with shipping industry regulations and their amendments. In addition, the seriousness of the consequences of a particular kind of non-compliance with a regulation that has not yet been enforced raises the question of whether the shipowner would be keen to comply in advance of the regulation becoming compulsory. It was suggested that a vessel in dry dock can be modified for compliance more easily than a vessel performing her duty under the

⁶⁷ See para. 4.5.2, p.312. At the outset, new regulations are merely recommendations and therefore optional during this period. By making them immediately compulsory with certain allowances, the safety standards that affect the obligation of seaworthiness will increase.

⁶⁸ See para.4.5.1, at p.312. Stating that there should be a provision for sanction and penalties in the IMO conventions, e.g. SOLAS.

⁶⁹ See para. 4.6.1, at p.318.

⁷⁰ [2008] EWCA Civ 584. For a detailed discussion of this case, see para. 4.6.1, at pp.315-318

charterparty contract.⁷¹ Thus, it might be easier and less costly for the shipowner to anticipate and pursue changes according to the regulations prior to the date of enforcement rather than taking steps to comply during the charterparty. At a later stage, during the course of performing the contract of carriage, the owner might incur further costs if he is required to divert the ship far from the trading ports in order to reach a port that can provide facilities to comply with new regulations. It is worth stressing⁷² that the court in *The Elli and The Frixos*⁷³ alluded to the ongoing obligation. The shipowner, being contractually responsible, would raise the standard of the seaworthiness obligation by investing in earlier compliance with the relevant regulations.⁷⁴

The ongoing obligation of seaworthiness would result in the shipowner having to establish a proper system of compliance with the regulations. As a result, the shipowner would be in compliance with regulations in advance, in order to avoid any unseaworthiness of his vessel⁷⁵ and any non-compliance with regulations, which might result in a breach of the contract of carriage.⁷⁶

7.3.5 The Example of the STCW Convention

⁷¹ See sub-para. 'The Impact of the Shipping Standards and Crew Negligence', at p.325. The nature of the intended voyage may affect the stringency with which the ship is examined before sailing. See for example *The Assunzione* [1956] 2 Lloyd's Rep. 468, p.487.

⁷² See Chapter Four, para.4.6.1, at pp.315-318.

⁷³ *Golden Fleece Maritime Inc and Others v ST Shipping & Transport Inc (The Elli and The Frixos)* [2008] 2 Lloyd's Rep 119.

⁷⁴ See para.4.6.1, at p.317.

⁷⁵ *The Toledo* [1995] 1 Lloyd's Rep. 40, p.50. Clarke J held that the shipowner had failed to exercise due diligence to provide a seaworthy vessel before the vessel commenced her voyage. He also added that a reasonable shipowner would have set up a proper system for the inspection and ascertainment of the internal damage or problems which caused the unseaworthiness.

⁷⁶ See Chapter Four, para.4.6.1, at p.315. See also the example of containers at p.320.

According to the general view taken in Chapter Four, accidents can also happen to modern vessels that are built and equipped to the latest shipping standards but manned by incompetent or inadequate seafarers who have inadequate training from substandard marine schools or are suffering from fatigue. It was stated⁷⁷ that the ruling in *The Eurasian Dream*⁷⁸ is to the effect that fully certified crew can be found incompetent if they are not provided with proper or adequate training in addition to any training that a Flag State requires for certification purposes.

The IMO has attempted to address the widely recognized problem of crew fatigue through the latest revision of the STCW Convention, by providing for recorded and verifiable minimum rest periods.⁷⁹ However, even this may prove inadequate. As discussed in Chapter Four,⁸⁰ there is room for the provision being rendered ineffective if the expression ‘*emergency, drill or in other overriding operational conditions*’, which affords legitimate grounds to disregard the minimum rest period, is misused or abused (sometimes consistently) by the owner/carrier.

7.3.6 What can be done to improve the current situation?

As suggested in Chapter Four,⁸¹ the owner/carrier, as part of an on-going due diligence obligation, should constantly assess the workload of the crew and

⁷⁷ See para.4.4.1, at p. 296-297.

⁷⁸ *Papera Trades Co Ltd and Others v Hyundai Merchant Co Ltd and Another (The Eurasian Dream)* [2002] 1 Lloyd’s Rep. 719.

⁷⁹ See para. 4.4.2, at p. 305.

⁸⁰ See para.4.4.2, at p.306.

⁸¹ See Chapter Four, para. 4.4.3, at p.308.

increase the crew's number beyond the vessel's statutory minimum if her size, type, area of work, and more importantly, her age dictate this.

It was mentioned above that Chapter Four suggested⁸² that IMO should create a scheme of sanctions applicable to all Contracting States of the relevant convention. Such a scheme might include creating a blacklist of shipowners, vessels, marine institutions and even Member States as opposed to white list members,⁸³ along with withdrawal of the right to issue certificates.⁸⁴ Furthermore, documentation showing that Member States are giving 'full and complete effect' to the relevant provisions of the convention should be checked by IMO personnel⁸⁵ or the task should be assigned to a reputable entity to check that standards are strictly applied.

Further, Member States should establish a penalty or detention⁸⁶ scheme for shipowners, shipping management companies or charterers who do not comply

⁸² See Chapter Four, para. 4.5.1, at p.311.

⁸³ Explained at p.311.

⁸⁴ Lord Donaldson of Lynton, 'The ISM Code: The road to discovery?' (1998) LMCLQ 526-534, p.532.

⁸⁵ In order for IMO to carry out such a task, the number of personnel should be increased. Currently there is only 300 staff.

⁸⁶ In a very recent case, *The MS Thor Liberty* [2012] Cas. R12/611, KAC. 1068. (Kouvola Appeal Court.) 13 December 2012. On the vessel's arrival to an intermediate port, an inspection by the Finnish Transport Safety Agency was carried out. The vessel was detained for weeks because she was loaded with dangerous cargo that was stowed in violation of the IMDG Code prior to sailing from the port of loading in Germany. The Finnish court had jurisdiction and thus prosecutors were able to detain the vessel for improper loading/stowage of the cargo but only because of the obligation of seaworthiness under the Finnish Maritime Code (FMC) that applies to the contract of carriage as a continuous one. According to Article 13 of the Finnish Maritime Code, the master of the vessel must ensure that the vessel is loaded in such a way that it is seaworthy and remains seaworthy during the voyage. The vessel was not allowed to sail in this unseaworthy condition. Further, the explosive cargo, pursuant to the IMDG Code and SOLAS, should have been transported in containers rather than pallets. Without imposing a continuous obligation of seaworthiness by the FMC, the IMDG Code would not be of use to provide safe carriage. For further information on this case, see Komonen, M. and Ljungberg, H., 'Appeal court overrules charges against officers of missile ship', (January 30 2013) cited in <http://www.international-lawoffice.com/newsletters>.

with industry conventions.⁸⁷ However, it was also mentioned that implementation of the IMO regulations if left entirely to States, the standard of applying those conventions and regulations varies, which may result in the reduction of the effectiveness of such instruments.⁸⁸

The above demonstrates that shipping industry practice conflicts with the current law on seaworthiness in the Hague/Hague-Visby Rules. The current law obliges a shipowner to exercise due diligence before and at the beginning of the journey, whereas industry conventions, particularly SOLAS and the STCW Convention,⁸⁹ in spite of leaving gaps, provide obligations that are not limited to the time of sailing. There is a contradiction in this respect that can be easily understood with the hypothetical example, in Chapter Four,⁹⁰ of two containers loaded at different ports but stowed adjacently and suffering the same damage from the same cause. The applicable industry standard would equally cover both containers but liability under the Hague/Hague-Visby Rules may be different. In this respect, it is argued that there is an inverse lack of harmonisation between the industry standards and carrier's due diligence obligation during the period before and at the commencement of the voyage. The Rotterdam Rules seek to cure this position with the introduction of the on-going due diligence obligation.

Nonetheless, to minimise the adverse effect of the gaps left by shipping industry conventions on the standard of seaworthiness, the shipping industry framework itself should be proactive rather than reactive to marine incidents. This may

⁸⁷ See para. 4.5.1, at p.312.

⁸⁸ See para. 4.5.1, at p.310.

⁸⁹ See discussion at para. 4.4.3, at p.308, in regards with the discussion related to the observance should be made by the carrier when deciding the safe number of crew.

⁹⁰ See the sub-para. , 'The Example of Container Shipping', at p.320.

involve undergoing a continuous long-term and comprehensive review of the regulations.⁹¹

7.4 Supply of Containers and Seaworthiness

The extent of liability (if any) for cargo damage, as a result of an unfit container that was supplied by the carrier, will depend on the way the court construes the contract of carriage and bills of lading. A court may consider the duty of keeping the container fit to fall within the obligation of seaworthiness or care of the cargo etc.⁹²

It was introduced in Chapter Five⁹³ that, generally speaking, responsibility (and thereafter liability) for the supply of containers and/or the stuffing of cargo inside the container will fall to one of two parties, the shipper or the carrier. It was further discussed that the supply of the container by the carrier can be considered as a separate agreement outside the scope of the Hague/Hague-Visby Rules.⁹⁴ Chapter Six subsequently discussed the following.

When the obligation under Article III, r.1 of the Hague/Hague-Visby Rules is extended to the container, the supply of the container by the carrier would not constitute a separate agreement outside the scope of the Hague/Hague-Visby Rules. Thus, liability will be dealt with by Hague/Hague-Visby Rules. This was obvious from the ruling of the Dutch court in *The NDS Provider*, which was not based on the presumption that the container is part of the hold of the ship.⁹⁵ Alternatively, the supply of the containers by the carrier can be treated as a

⁹¹ See Chapter Four Sub-para., 'What can a shipowner do to overcome the inefficiencies of SOLAS?' at p.291.

⁹² See, 'Practical Implications of the Carriage of Containers', at p.387.

⁹³ See 5.1.1, at p.330.

⁹⁴ See para.6.1, at p.388.

⁹⁵ See para. 6.1, at p.390.

separate agreement outside the scope of the Hague/Hague-Visby Rules and thus the unsuitability of the container is considered as a defective packing.⁹⁶ No duty was imposed on the carrier so there can be no liability for defective packaging.⁹⁷ If the carrier's supply and stuffing of the container is considered as a separate contract, the carrier will not be liable if the duty of supplying the container is outside the period of responsibility.⁹⁸

If damage to containerised cargo occurs outside the period of the sea carriage, the carrier might be rendered liable. Liability is not based on maritime transport law if the supply of containers by the carrier is considered as a separate agreement, e.g. a rental contract, outside the scope of the Hague/Hague-Visby Rules.⁹⁹ It was argued that it does not matter whether the container is considered as part of the ship or cargo if the carrier supplies a defective container, liability should also fall within Article III, r.2.

Chapter Six provided an answer as to the effect on liability of a defective container where the shipper takes responsibility for stuffing the container by drawing an analogy with the 'Free in Out Stowed' clause.¹⁰⁰

In the US,¹⁰¹ if the stuffing carried out by the shipper resulted in damage to the cargo due to bad stowage, the carrier will still be liable for the damage as the stuffing is not delegable and is one of the duties under Article III, r.2.¹⁰² A

⁹⁶ See the American case, *The M/V Skanderborg*, at para.6.1, p.391.

⁹⁷ See para.6.1, at p.391.

⁹⁸ See French case *Aix-en-Provence*, 9 December 1999, B.T. No. 2833 of Feb 2000, 93, discussed in para.6.1, at p.391.

⁹⁹ *The M/V Matisse*, CA Aix-en-Provence, 15 Feb 2007, (2007) DMF (M/V Matisse), discussed in para.6.1, at p.392.

¹⁰⁰ A question that was asked para. 6.1, p.394.

¹⁰¹ *Demsey & Assoc, Inc v SS Sea Star*, 461 F.2d 1009 (2d Cir. 1972) referred to in sub-para. 6.1, 'Shipper Stuffing Cargo the Containers', at p.394-395

¹⁰² See *Nichimen C In v MV Farland* [1972] 462 F 2d 319, at p.330 (2nd Cir 1972) in Chapter Six, sub-para. 'Shipper stuffing cargo inside the containers', at p.395. The obligations under Article III,

distinction must be made, as under English law, if stuffing the container is carried out by the shipper, then the carrier may not be liable for damage that was caused by improper stowage of cargo inside the container.¹⁰³

It was discussed that, if the carrier supplies and stuffs the containers, difficulties may arise as to whether such operations falls within the scope of Article II of the Hague/Hague-Visby Rules. If the supplying and stuffing of the container is carried out away from the ship, then such operations might be regarded as outside the scope of control of the carrier and would be subject to the 'freedom of the carrier' proviso within Article VII. In this case, the carrier can rely on an exclusion clause in the contract of carriage.¹⁰⁴

Another question that was discussed in Chapter Six was whether the shipper is obliged to inspect a container that was supplied by the carrier.

The carrier may still be liable for not inspecting and not refusing a container before loading where the defect in the container was 'apparent upon inspection'. This is because, first, if the container is considered as part of the ship, then the exercise of due diligence by inspection is not a delegable duty, as it falls within the exercise of due diligence as regards the entire ship.¹⁰⁵ Second, if the damage to cargo was caused by a failure to exercise due diligence to make the container cargoworthy prior to loading, the carrier may be liable on the basis of

r.2 of the Hague/Hague-Visby Rules are not delegable. The liability for negligent cargo loading, stowing and discharging was void under Article III, r.8 of the Hague/Hague-Visby Rules.

¹⁰³ *The Jordan II*, see Chapter Six, sub-para. 'Shipper stuffing cargo inside the containers', at p. 395.

¹⁰⁴ See Australian case, *Comalco Aluminium Ltd v Mogal Freight Service Pty, Ltd (The Oceanic Trader)* (1993) 113 A.L.R. 677. See Chapter Six, sub-para. 'Carrier stuffing cargo inside the container', at p.397.

¹⁰⁵ See Chapter Six, sub-para. 'Carrier stuffing cargo inside the container', at p.398.

actual knowledge of defects or failure to use due diligence in inspecting the container prior to stuffing cargo.¹⁰⁶

Further, as discussed in Chapter Six,¹⁰⁷ the standard of inspection prior to stuffing the container requires the supplier of the container to ascertain the fitness of the container in accordance with the CSC and other international obligations. The container should be cargoworthy, weatherproof, properly sealed and certified so that it can withstand the roughness of sea perils.¹⁰⁸ Defects such as microholes that are not visible upon a normal inspection and require an expert survey to discover them will not render the carrier liable if he is not able to reveal the defect by a normal and careful inspection of the container.¹⁰⁹ If the shipper is given a container by the carrier in order to stuff the cargo, the latter is not required to inspect the container in detail. If the container is sealed by the shipper, the carrier is not required to inspect the inside of the container unless the outside of the container raises an assumption that the inside requires further attention.¹¹⁰

It was argued that the purpose of the two major obligations imposed by Article III, r.1 and r.2 of the Hague/Hague-Visby Rules is to protect the cargo carried on board against the perils of the seas. Thus it would not be logical to exclude the obligation of due diligence by the carrier for the reason that the container is not expressly provided for under Article III, r.1.¹¹¹ Also, in some cases, it is easier

¹⁰⁶ See Chapter Six, see sub-para. 'Carrier stuffing cargo inside the container', at p.399.

¹⁰⁷ See Chapter Six, para.6.2, at p.402.

¹⁰⁸ See para. 6.2.1, at p.403.

¹⁰⁹ See para. 6.2.1, at p.406.

¹¹⁰ See para. 6.2.1, at p.407.

¹¹¹ See para.6.3, at p.409.

for the claimant to prove that the carrier was in breach of his seaworthiness obligation and that this breach caused the loss or damage to the goods.

It is unclear under English law whether there is an obligation on the carrier who supplies the container to exercise due diligence in supplying a cargoworthy container.¹¹² It was suggested that the way for the court to include container cargoworthiness as an obligation under Article III, r.1 is if the container is deemed analogous to (a) the superstructure of the ship, as the container would enhance the stability of the carrying vessel, as well as protecting the cargo from perils of the seas¹¹³; or, (b) the vessel's equipment. A container is analogous to equipment which is not rigidly connected to the ship, e.g. dunnage, and their presence in correct order and condition is important.¹¹⁴

The second part of Chapter Six¹¹⁵ turns to discuss the position of the container in Article 14(c) of the Rotterdam Rules. It was suggested that the courts should interpret the Rotterdam Rules on their own basis without reference to any previous approach.¹¹⁶ It was however suggested that the courts may refer to previous case law on the Hague/Hague-Visby Rules in the absence of clear wording. Thus, courts are likely to adopt one of two potential approaches. First,¹¹⁷ and arguably the most likely to be followed by an English court, is to draw analogies with previous case law on vessels' seaworthiness and to apply those principles to questions on container cargoworthiness. In respect of the seaworthiness obligation under Article 14 and its application to a container, the courts may deem the defective *container* that has caused damage to cargo

¹¹² See para. 6.3, at p.409.

¹¹³ See para. 6.3.1, at p.410.

¹¹⁴ See para. 6.3.2, at p.415.

¹¹⁵ Part Two of Chapter Five, at p.417.

¹¹⁶ See para. 6.4, at p.417.

¹¹⁷ See Chapter Six, para.6.4.1, at p.418.

stuffed inside it uncargoworthy or unseaworthy under Article 17(5), even if the defective condition does not endanger the safety of the ship.¹¹⁸ Another possibility is that the vessel will not be held uncargoworthy or unseaworthy if the container's unfitness caused damage only to the cargo without endangering the safety of the vessel.¹¹⁹ The second approach¹²⁰ depends on whether containers are considered as part of the vessel, along with decisions under the previous law, e.g. the Hague/Hague-Visby Rules, in different jurisdictions. It was assumed that the English court would resort to consulting decisions of other jurisdictions, which have already assessed the issue of container seaworthiness as part of the due diligence obligation. The question of whether the carrier should be held liable under the Rotterdam Rules for cargo damage caused by the unsuitability of his container may have been answered differently under various legal systems. Thus, even if the English courts sought to follow the route of applying cases decided in other jurisdictions, it would not be a straightforward exercise.¹²¹

The American approach to unfit containers does not regard the supplying carrier of a container liable for an unfit container, unless the container had endangered the safety of the vessel.¹²² As for the Chinese Approach to unfit containers, the carrier is rendered liable even if the unfit container caused damage to the cargo without endangering the safety of the ship. However, the forwarder who stuffed the container has been held partially liable for damage caused to the cargo from

¹¹⁸ See Chapter Six, para.6.4.1.1, at p.421.

¹¹⁹ See para. 6.4.1.2, at p.421.

¹²⁰ See Chapter Six, para.6.4.2, at p.425.

¹²¹ See para. 6.4.2, at p.426.

¹²² See Chapter Six, para.6.4.2.1, at p.427.

an unfit container.¹²³ Further inconsistencies in this area of law have been added by certain French cases where the carrier was held liable on the basis of a rental agreement for containers supplied by the carrier, rather than as a carrier. Applying such case law would not be justified under the Rotterdam Rules.¹²⁴

It was discussed in Chapter Six that the container should not be considered as part of the vessel or her equipment as this would create a rather strange result as regards Article 80(4).¹²⁵ This is because a volume contract under Article 80 of the Rotterdam Rules does not allow derogation from the obligation to provide a seaworthy vessel or equipment. Thus, the approach that considers the container as part of the vessel or her equipment would be at odds with Article 80(4) of the Rotterdam Rules.¹²⁶ Thus, the correct interpretation of the legal position of the container under the Rotterdam Rules is that it should not be considered as part of the vessel or her equipment. Further, it was suggested that containers should not be regarded as part of the cargo hold on the basis that containers merely impose on the carrier a legal obligation equal to the legal obligations regarding the cargo holds but differs in relation to the cargo holds practical use.¹²⁷

¹²³ See Chapter Six, para.6.4.2.2, at p.428.

¹²⁴ See Chapter Six, para.6.5.2.3, at p.429.

¹²⁵ See para. 6.4.1.2, at p.424.

¹²⁶ Ibid.

¹²⁷ See para. 6.4.1.2, at p.425.

7.5 The Implication of the Multimodality of the Rotterdam Rules on Seaworthiness

The Rotterdam Rules are designed to take into account a wider door-to-door scope of coverage that is needed for multimodal container carriage when the carriage involves at least one international sea leg.¹²⁸ The opening of Article 14 specifies obligations applicable to the 'voyage by sea'. This suggests that the obligation of container seaworthiness applies only when the container is on board the vessel.¹²⁹ Also, as the Rules are silent on the obligation of container seaworthiness where the container is supplied by the carrier, the Rules seem to apply to the inland carriage where the contract of carriage is intended to be door-to-door.¹³⁰ This suggests that whilst the obligation of container seaworthiness is applicable only to damage caused during the voyage, damage can also relate to acts or omissions causing the defect prior to the voyage, i.e. before and at the beginning of the voyage. Gertjan van der Ziel, a participant in the drafting process has expressed in private email correspondence with the author the opinion that the title to Article 14, namely, 'specific obligations applicable to the voyage by sea' places emphasis on the point that the duty is applicable only to damage caused by a defective container during the voyage. The obvious question that arises is whether it is important for the Rotterdam Rules to extend the obligation of seaworthiness to cover the land carriage leg. Any attempt to answer this question would inevitably lead to further questioning as to the legal implications of limiting the seaworthiness obligation to the sea carriage leg only. This will now be discussed in the next section.

¹²⁸ See para.5.3, at p.336.

¹²⁹ See para.5.4.2, at p.346.

¹³⁰ See para.5.4.2, at p.346.

7.5.1 The Importance of Extending the Obligation to Land Carriage

The scope of the cargoworthiness of a container is limited to the sea carriage. It was suggested that there is no valid reason why such an obligation should be limited in scope in the same way as the carrier's obligation to exercise due diligence to provide a seaworthy vessel.¹³¹ It was noted that even if the duty is extended, the Rotterdam Rules do not impose a direct duty on the sub-carrier, nor would it support recourse unless the carrier contracts to the higher standard. In order to achieve this, the head carrier must ensure that requirements for carriage by sea are followed by the sub-carrier.¹³² Arguably, this would benefit the cargo-interests, as well as the carrier. Further, the standard of care extended to the land carrier will and should be at a similar level to the standard of due diligence in keeping the container fit during the land carriage. As a result, the chance of a vessel becoming unseaworthy will be reduced.¹³³

It was further suggested with a hypothetical example that if the exercise of due diligence is not imposed on the maritime performing party prior to shipment, the cargo-claimant will not be able to seek an indemnity from the maritime performing party who was responsible for the safe transport of containers within the port even though his negligence has resulted in the container becoming defective.¹³⁴

¹³¹ See para.5.4.2, at p.346.

¹³² See para.5.4.2, at p.351.

¹³³ See para. 5.4.2, at p.351.

¹³⁴ See para. 5.4.2, at p.349.

7.5.2 The Effect of the Multimodality on the Obligation of Seaworthiness

Solutions provided by Articles 26 and 82 create three potential problems explained in detail in Chapter Five and summarised individually below.

7.5.2.1 Unknown Standard of Care

First,¹³⁵ when Article 14 of the Rotterdam Rules is read in conjunction with general liability provision of the inland conventions, e.g. Article 17(2) of the CMR, the net result hardly appears to be the one intended by the drafters; the liability system will be similar to the one under the Rotterdam Rules and, therefore, would defeat the purpose of Article 26 of the Rules. It has been suggested, in this respect, that the interpretation of the wording ‘specifically provide[d] for the carrier’s liability’¹³⁶ would solve the problem if the wording is construed in such a way as to include all the duties inferred from the general liability rules of the inland regimes, e.g. Article 17 of the CMR.¹³⁷

The requisite standard of examining a container in order to satisfy obligations under the Rotterdam Rules is still unknown. It was argued in Chapter Five¹³⁸ that potential adherence to safety standards other than widely used international safety codes, i.e. the IMDG Code, may result not only in damage to the cargo inside the container but may also affect the vessel’s seaworthiness.

¹³⁵ See para.5.4.3, at pp.355-356.

¹³⁶ Article 26(b).

¹³⁷ As per Nikaki, see Chapter Five, para.5.4.3, at p.357.

¹³⁸ See Chapter Five, para.5.4.1, at p.340.

In Chapter Five,¹³⁹ it was noted that during inland carriage, national safety regulations, e.g. ADR,¹⁴⁰ provide standards of checking containers and tank containers but it was also questioned whether the standard of care required is similar to that required by the IMDG Code. Even if the safety standards of ADR are presumed to be equal to the IMDG Code, the crew on board the carrying ship may not be familiar, e.g. with the labelling and marking provisions of ADR. Thus, accidents are likely to occur. The solution put forward in Chapter Five was to label and check the fitness of the container according to the IMDG Code during the inland transit by applying its provisions to the inland operator/carrier (if the contracting sea carrier is in control of the entire carriage), instead of applying ADR.¹⁴¹

7.5.2.2 Cancelling Out the Ongoing Obligation of Seaworthiness¹⁴²

If an inland water carriage regime takes precedence over the sea carriage regime and, in accordance with the conditions mentioned in Chapter Five, the provisions of CMNI were held to be applicable rather than the Rotterdam Rules, the effect would be to cancel out the extended obligation of seaworthiness, as well as the obligation of container cargoworthiness.¹⁴³ This is because the obligation of seaworthiness under the CMNI Convention is not extended to the

¹³⁹ See para.5.4.1, at p.340.

¹⁴⁰ See ADR, para. 1.4.3.4(b) and para. 1.4.2.2(c).

¹⁴¹ See para.5.4.1, at p.344.

¹⁴² See para.5.6.1, at p.359.

¹⁴³ See the discussion on Article 14 and 14(c) of the Rotterdam Rules, respectively. See para.5.6.1, at p.360.

entire voyage and there is no obligation of cargoworthiness in respect of containers supplied by the carrier.¹⁴⁴

7.5.2.3 Derogation of the Standard of Seaworthiness Obligation

Assuming further that the CMNI Convention governs the contract, a problem might emerge from the untested language of the Convention. The phrases 'regulation in force' in Article 3.3 of the CMNI Convention might be construed in different jurisdictions to constitute, for example, national or regional regulations rather than international regulations.¹⁴⁵ This may have the implication that the carrier would be obliged to adopt only local regulations governing the scope of seaworthiness of the vessel and containers. As a result, the standard of seaworthiness would be lessened as the resulting standard would not be pursuant to the international shipping standards, which set the prevailing standards of maritime safety. Further, it was doubted in Chapter Five¹⁴⁶ whether the obligation of seaworthiness should be tested against the condition of the contemplated contracted voyage as there is nothing in the CMNI Convention obliging the carrier to do so. However, this notion will be redundant if the CMNI

¹⁴⁴ If a defect emerged in the container during the voyage and such a defect was repairable on board but no spare parts were available, there will be no duty imposed on the carrier by Article 3.3 of the CMNI Convention to take further steps, e.g. to pick up spare parts from an intermediate port. By contrast, such a duty is imposed under Article 14 of the Rotterdam Rules. See para.5.6.2, at p.361.

¹⁴⁵ See para.5.7, at p.365. The wording of Article 3.3 suggests that the reference to regulations in force is related to the manning and equipment of the ship rather than her seaworthiness, but, as explained in Chapter One, manning and equipment are two aspects of seaworthiness which, if inadequate or insufficient, will render the ship unseaworthy.

¹⁴⁶ See para.5.7, at p.368.

Convention requires the obligation of seaworthiness to be tested against the conditions to be encountered during the contracted voyage.¹⁴⁷

The multimodality of the Rotterdam Rules has opened the door to a number of potential problems. The lack of the application of the container cargoworthiness concept,¹⁴⁸ the uncertainty of conflicting laws,¹⁴⁹ the multimodal trans-shipment problems and the uncertainty as to the applicable regime on the carrier's liability may disturb the balance of fairness that is meant to arise from the extension of the carrier's obligation to exercise due diligence to provide both a seaworthy vessel and container during the voyage.¹⁵⁰

In summary, it seems from the above analysis that the Rotterdam Rules are far from being free of juridical or political problems. The end conclusion is that the Rotterdam Rules cannot be favoured as a transport regime to govern multimodal carriage,¹⁵¹ unless further modification of their provisions are effected or certain contractual terms are used by parties to resolve the uncertainties created by the Rules.

7.6 Suggested Modification

Insofar as the first proposal is concerned, a suggested addition to both Articles 26 and 82 would be a provision to the effect that

¹⁴⁷ See para.5.7, at p.368.

¹⁴⁸ See the example of the CMNI Convention para. 5.6.1, at p. 359, also see at para.5.9.1, at p.373.

¹⁴⁹ See the example para.5.4.3, at p.352.

¹⁵⁰ See para 5.6.3, at p.364. The multimodality of the Rotterdam Rules may affect the continuing seaworthiness obligation if one of the inland regimes, e.g. the CMNI Convention, took over the obligation of seaworthiness, as the extended seaworthiness obligation could be cancelled out with a similar potential impact on the container cargoworthiness obligation, as explained in para.5.6.1, at p.359.

¹⁵¹ See para.5.9.3, at p.376.

‘when the provisions of other conventions and/or instruments are applicable, a claim for unseaworthiness must not be reduced to a standard below the minimum standard applicable under Article 14(a)-(c).’¹⁵²

This modification is essential to prevent the cancelling out of the seaworthiness obligation and consequential liability, for the reasons explained above.

A second approach that was suggested in Chapter Five¹⁵³ is the non-mandatory use of contractually agreed terms in the contract of carriage. Obviously, this can only be done where contractual modification is allowed and could be used in order to set a minimum liability amount in accordance with the minimum benchmark set by the Rotterdam Rules. Such an approach might help parties to solve many of the multimodality generated problems, e.g. derogation from or cancellation of the obligation of seaworthiness and/or container seaworthiness.¹⁵⁴

However, there are some downsides to the non-mandatory approach, where, for example, the contractual carrier’s recourse against sub-contractors cannot be known. Thus, the addition of a small contractual provision to include the right of a third party to claim against the sub-contractor for a similar amount would assist parties in directing any action against the party actually at fault.¹⁵⁵ However, as explained, freedom of contract may not reduce the chance of

¹⁵² See para.5.10.1, at p.377.

¹⁵³ See 5.10.2, at p.381.

¹⁵⁴ See proposals below, para.7.7, at p.476.

¹⁵⁵ If there is no control of the contract between the cargo-interest and the carrier, the carrier could match the claimant’s right to his recourse position which might be set at a low level. The network approach depends on the application of mandatory rules in the contract with the contracting carrier.

adopting a less protective approach in countries where the carrier has a stronger negotiating power.¹⁵⁶

A solution¹⁵⁷ to most of the above problems is to use a general and uniform provision which removes the need for a separate rule of seaworthiness and is applicable to all the modes of transport that might be used in door-to-door carriage.¹⁵⁸ However, in doing so, there may be no assurance as to whether all the facets of seaworthiness are adequately addressed. The shipping industry is constantly developing. Future inventions and technological developments in respect of a vessel's hull or cargo holds are not envisaged to create difficulties insofar as the obligation of seaworthiness pursuant to Article 14(a) is concerned.¹⁵⁹

This obligation is now extended to a cargoworthy container. The balance is tipped in favour of the cargo-interests, creating an apparently fairer relationship between carriers and cargo-interests. Nevertheless, as it has been shown above, the position is far from clear in respect of the multimodal aspect of the Rotterdam Rules that is regulated by Articles 26 and 82.¹⁶⁰ The result may be that the scope of the seaworthiness obligation is limited to the period before and at the beginning of the voyage.¹⁶¹ Accordingly, and further to Article 3.3 of the CMNI Convention, the carrier cannot be held liable for the unfitness of a

¹⁵⁶ See Chapter Five, para.5.10.2, at p.383.

¹⁵⁷ See para. 5.10.1.1, at p.378.

¹⁵⁸ Unlike the suggestion to use a general liability provision, such as Article 5.1 of the Hamburg Rules, this general liability provision is not a uniform liability provision.

¹⁵⁹ It might be a reason for not adopting a central liability provision similar to Article 5.1 of the Hamburg Rules because there is no clear guidance as to the relevant standard of care to be adopted. See para.5.10.1.1, at p.379.

¹⁶⁰ As indicated in para. 5.3, at p.338-339, Article 82 is not confined to unlocalised damage.

¹⁶¹ Article 79(1) cannot protect cargo-interests from the lessening of the recognised duty by the application of the relevant set of rules. It is merely to protect cargo-interests from an express agreement in derogation of the recognised duty, as any such attempt is rendered void.

container he supplied.¹⁶² In this respect, a suggestion is that either a clause could be added to the contract of carriage or, as a long-term approach, a provision could be added to Article 82 on the first revision of the Rotterdam Rules to the effect that the obligation of seaworthiness and the responsibility of the contracting carrier are continuing throughout the entire transportation.¹⁶³ Consequently, the multimodal carrier would be subject to the responsibilities imposed and the liabilities entailed by Article 14 of the Rotterdam Rules.

Finally, the Rotterdam Rules, as far as door-to-door carriage is concerned, do not improve the position of cargo-interests. Under the Hague/Hague-Visby Rules, a provision in a contract of container carriage excluding liability for the non-sea carriage leg would be valid,¹⁶⁴ depending on the construction of the contract and whether the Hague/Hague-Visby Rules were overridden by other express terms.¹⁶⁵ The Hague/Hague-Visby Rules allow exclusion of liability during the non-sea stages by the use of express terms, which defeat the application of Article III, r.8 that would otherwise apply.¹⁶⁶ By analogy, one could surmise that the Rotterdam Rules do not provide a better regime as to the application of other transport conventions that reduce or rule out the obligation of seaworthiness, or are unclear as to particular aspects of liability, such as container fitness under the CMR Convention.¹⁶⁷ Although, it seems unlikely that it would be possible to treat the supply of the container as involving a separate

¹⁶² See the potential impact on container cargoworthiness, para.5.6.1, p.359, c.f. Article 16 of the CMNI Convention and the absence of any management defence in Article 18.

¹⁶³ See para. 5.11, at p.385. There is a difference between responsibility being divided among different persons and the liability of a single person changing according to the mode of transport.

¹⁶⁴ See para.5.10.2, at p.381.

¹⁶⁵ See Aikens et al., *Bills of Lading*, (1st ed., 2006), para.11.68; *Finagra v O.T. Africa Line*[1998] 2 Lloyd's Rep. 622.

¹⁶⁶ See f.n. 195, at p.384.

¹⁶⁷ See para.5.9.3, at p.375.

contract, it might be possible to exclude liability for damage occurring during a land section for which the carrier had not contracted but where the damage was due to a defect in a container which he had supplied.¹⁶⁸

As solutions to the above problems, the following paragraphs contain proposed provisions.

7.7 Proposals

7.7.1 Provision for Vessel Seaworthiness and Container Cargoworthiness

*'If more than one international convention applies to loss, damage or delay of the cargo provided that the unfitness of the vessel or containers is the cause or the partial cause to the loss, damage or delay, the provisions regarding the carrier's obligation (Article 14) and liability (Article 17) relating to seaworthiness must govern such a claim.'*¹⁶⁹

or

'Any provision of any inland intentional convention that derogates from or rules out the obligation and liability of the carrier in respect of container cargoworthiness will be null and void.'

¹⁶⁸ There is a greater chance perhaps that responsibility for inspection of container could be passed to the sender or liability shared.

¹⁶⁹ See para.5.10.2, at p.382.

7.7.2 Provision to Include the Obligation of Container

Cargoworthiness to the Inland Carriage when Supplied by the Sea Carrier

*'[The] [any] inland carrier has a duty to exercise due diligence to keep containers which are provided by the sea carrier, cargoworthy (seaworthy) during the inland carriage.'*¹⁷⁰

7.7.3 Provision for Chemical Container Cargoworthiness

*'Any exercise of due diligence by the carrier or inland carrier in respect of the fitness of a container must comply with the international shipping standards including, at least, those provided in SOLAS and the IMDG Code.'*¹⁷¹

So long as a regime fails to remove uncertainty as to liability for unseaworthiness, the danger looms that large exporting countries, such as China, will excessively concentrate on the economic impact of such imperfection of the rules, which might distract attention from their ratification. This may be the fate of the Rotterdam Rules.

Whether the Rotterdam Rules are the right or wrong choice for regulating liability for unseaworthiness on a multimodal basis depends on the balance of risks and fairness between parties being improved in relation to the current law with regard to both the imposition and the limitation of liability for unseaworthiness. In most of the situations observed above and, particularly in

¹⁷⁰ See para.5.4.1, at p.344. As explained above, this duty can only be imposed if the head carrier imposed it in the contract, see Chapter Seven, para.7.5.1, 'Importance of extending the obligation to inland carriage'.

¹⁷¹ See the discussion under para. 5.4.1, at p.340.

jurisdictions that have ratified none of the inland transport conventions, the regime created by the Rotterdam Rules would be better and fairer as regards liability for unseaworthiness.

7.8 The Burden of Proof and Commercial Risk Allocation

In Chapter Three,¹⁷² the burden of proof under the Hague/Hague-Visby Rules was explained in four phases as follows. First, in a seaworthiness (or any other) claim, the burden is on the claimant to establish a *prima facie* case of loss or damage against the carrier.¹⁷³ Secondly, the carrier may choose to disprove the loss alleged by the claimant or to prove that the damage was caused by one of the exceptions available under Article IV, r.2. At this stage, the carrier does not need to prove that he provided a seaworthy vessel in order to rely on one of the exceptions under Article IV, r.2.¹⁷⁴

Thirdly, the claimant may defeat the carrier's reliance on Article IV, r.2 by providing evidence to demonstrate that the defect that caused the damage resulted from unseaworthiness.¹⁷⁵

Finally,¹⁷⁶ if the claimant succeeds in rebutting the carrier's defence, the carrier may still be able to challenge the claimant's allegation by proving that the defect that caused the damage emerged in spite of his exercise of due diligence pursuant to Article III, r.1.¹⁷⁷

¹⁷² See generally para. 3.2, at p.174.

¹⁷³ See para. 3.2.1, at p.175.

¹⁷⁴ See para. 3.2.2, at p.176.

¹⁷⁵ See para. 3.2.3, at p.178.

¹⁷⁶ See para. 3.2.4, at p.193.

¹⁷⁷ See in Chapter Three, para. 3.3, at p.193, the carrier is not required to prove that he had exercised due diligence in all aspects of seaworthiness, i.e. the exercise of due diligence in

7.8.1 Problems under the Current Law

The current English case law on the burden of proof is undoubtedly far from free of difficulties. For instance, the claimant has the burden of proving the unseaworthiness and he should also prove the unseaworthiness as a cause of loss. Such difficulties were discussed in Chapter Three.¹⁷⁸

First,¹⁷⁹ the carrier is the one who has access to all of the relevant information about the vessel.¹⁸⁰

Secondly,¹⁸¹ the limited obligation of due diligence clearly indicates that in order to prove that the vessel was unseaworthy, the evidence must demonstrate that the defect that caused unseaworthiness must be related to the time before the commencement of the voyage. This may require the claimant to carry out expensive, impractical and lengthy procedures in order to review an excessive

respect of hull, machinery, equipment, etc. but merely in the aspects relevant to the allegation by the cargo-claimant.

¹⁷⁸ See para. 3.2.3.1, at p.178.

¹⁷⁹ See para. 3.2.3.1, at p.178.

¹⁸⁰ The claimant may search for evidence that may be irrelevant or inadmissible because he does not know what exactly went wrong or what caused the unseaworthiness, and he may therefore lose his case. The unseaworthiness may be caused by a chain of events, which may prove the unseaworthiness if put together. However, it may be difficult for the claimant to prove all of the omissions or acts especially if they were exercised at different times, well before the unseaworthiness ought to be discovered. See the definition of relevance as a test for determining whether one fact should be regarded as 'relevant' evidence or should be backed up with other fact(s) to form evidence in Digest of the law of Evidence (12th ed.) art.1. This test was approved in *R v Nethercott* [2001] EWCA Crim 2535, [2002] 2 Cr App Rep 117; Tapper, C., *Cross and Tapper on Evidence*, (11th ed., 2007), pp.69-74; Anderson, P., *The Mariner's Role in Collecting Evidence*, (2006, The Nautical Institute). In this book, the Rt Hon. Lord Clarke, former admiralty Judge and now Justice of the UK Supreme Court, says: "*Courts depend upon evidence. Contemporary evidence is of the utmost importance. It is vital to make a note or report of any incident immediately*".

¹⁸¹ See para. 3.2.3.1, at p.180.

list of evidence.¹⁸² Thirdly,¹⁸³ it is unclear as to what extent the claimant must prove the unseaworthiness as a cause of loss, although it may be true to say that the law does not demand proof of causation, only proof of probable causation.¹⁸⁴

The above demonstrates that the current law does not balance the difficulties of proof fairly. It should be, in an ideal world, easier and more logical for a court to mitigate the standard of proof on the claimant, who has little or no means of access to the facts required to prove the unseaworthiness or the cause of unseaworthiness.¹⁸⁵ Changes to the current law are not impossible as the Hague/Hague-Visby Rules do not make specific stipulations as to who bears the burden of proof of fault. Thus, one can draw suggestions from the approach or the *obiter dicta* of the court. This takes us to briefly demonstrating the potential solutions that can be adopted by the court.

7.8.2 How can the current principle be ameliorated in order to improve current law?

¹⁸² See the difficulties faced by the claimant in collecting evidence and whether such evidence is evaluated or not. Anderson, P., *The Mariner's Guide to Marine Insurance*, (The Nautical Institute, 1999), pp. 69-78.

¹⁸³ See para. 3.2.3.1, at p.178.

¹⁸⁴ *Gregg v Scott* [2005] 2 A.C. 176, [2005] Lloyd's Rep. Med. 130, on appeal, the House of Lords held that even if the qualification of future losses was coincidentally decided on the evaluation of risks and chances, the plaintiff had to show that the loss was consequential on injury caused by the defendants' negligence. Causation had to be shown on the balance of probabilities.

¹⁸⁵ In a recent case, *CHS Inc Iberica SL and Another v Far East Marine SA (The Devon)* [2012] EWHC 3747 (QBD)(Comm), despite the fact that the claimant has to make out its case on evidence as to the vessel's causal unseaworthiness, Mr Justice Cooke stated that the case was not a case where an inference of unseaworthiness could be drawn from the timing of the breakdown. However, he said that: "*I am entitled to bear in mind the timing of the engine breakdown and the absence of material evidence adduced by the owners,*" para.21.

One suggested solution is that the common law principle should no longer be applied.¹⁸⁶ Instead, the carrier, who knows what he did or did not do towards the discharge of his obligation to exercise due diligence, should be, in the first place, burdened with proving seaworthiness in connection with the cause of the loss or damage and, failing that, with proving that he exercised due diligence. This is the bailment approach.¹⁸⁷ The court can follow the approach of McHugh J in the Australia High Court.¹⁸⁸ As the judge put it, the fact that the cargo reached its destination in a damaged condition or never arrived amounts to evidence of breach of the seaworthiness obligation and it is, therefore, incumbent on the carrier to prove the contrary.

Another suggested solution¹⁸⁹ relates to the court's readiness to infer the vessel's unseaworthiness. This approach was suggested by Scrutton LJ,¹⁹⁰ where he stated that it is enough for the court to feel that the ship had been seaworthy and, on the balance of probabilities, that the claimant had discharged his burden of proving this point. However, one cannot consider this approach of the court as a complete solution, as the courts need to consider certain factors

¹⁸⁶ See sub-para. 'Shifting the burden to the defendants - the bailment approach', at p.186.

¹⁸⁷ This is also a common law concept but should not be confused with the common law principle applied by courts in the absence of specific provisions or guidance in the HVR in relation to the burden placed on the cargo-claimant to prove the vessel's unseaworthiness in the first place.

¹⁸⁸ *Great China Metal Industries Co. Ltd v Malaysian International Shipping Corp Bhd (The Bunga Seroja)* (1998) 72 ALRJ 1592, p.1611, per McHugh J. In non-seaworthiness cases, see *Pendle & Rivett Ltd v Ellerman Lines Ltd* (1927) 29 Ll. L. Rep. 133, p.136, per MacKinnon J. The carrier is virtually required to negate the fault on his part. Briefly discussed in para. 3.6, at p. 199.

¹⁸⁹ See sub-para. 'The inference of unseaworthiness- a life buoy for the claimant', at p.183.

¹⁹⁰ See *Cosmopolitan Shipping v Hatton & Cookson* (1929) 35 Ll. L. R 177, cited in M. Clarke, *Aspects of The Hague Rules: A comparative study in English and French Law*, (Martinus Nijhoff - The Hague, 1976), at p.177. See sub-para. 'The inference of unseaworthiness - a life for the claimant', at p.185.

in order to determine whether such an inference can and will be drawn.¹⁹¹ Each case will be determined on its particular facts and circumstances which may lack those factors that would avail the court of the reasons to draw the inference by the *res ipsa loquitur doctrine*.¹⁹²

The above, however, should be addressed by means of expressed provisions or adopting a new set of rules.

It was suggested in Chapter Three¹⁹³ that, in order to strike a better balance between the parties, when the burden is on the carrier who invokes an excepted peril, the cargo-claimant should be allowed to simply disprove the existence or causal connection of the excepted peril invoked by the carrier rather than showing that the vessel departed in an unseaworthy condition. This is important in situations where it would be easier for the cargo-claimant to rebut either the existence of the peril or the causal connection between the peril and the loss, rather than proving unseaworthiness.¹⁹⁴

If the above propositions are not considered as applicable, it could be suggested that a term can be agreed between the parties in the contract of carriage to oblige the carrier to disclose material information, e.g. charts,

¹⁹¹ This approach is limited as the inference of negligent causation by the defendant is possible only if (1) in the type of situation the defect that caused unseaworthiness does not occur by itself unless there is negligence; and (2) other possible responsible causes are sufficiently eliminated by the evidence. For further information, see Wright, R., *Proving Causation: Probability versus Belief*, cited as Chapter 10 in R. Goldberg, *Perspectives on Causation*, (2011, Hart Publishing), p.219. Further, see carriage of goods by sea cases: *Anderson v Morice* (1875) L.R. 10 C.P. 609. In this case, Blackburn J stated that: “*During the argument we gave our judgment that the evidence was such as to make it a fair question for the jury whether the ship was or was not unseaworthy, and was or was not lost by perils of the seas, and therefore that the rule to enter the verdict for the defendants on those issues was properly discharged. The question whether the verdict was against the weight of evidence was not before us,*” at p.615.

¹⁹² See p.184, f.n. 64.

¹⁹³ See sub-para. ‘Rebutting the Existence of the Peril’, at p.189.

¹⁹⁴ See a similar approach in the American case *New Rotterdam Insurance Co. v S.S. Loppersum* 215 F. Supp 563, 1963 AMC 1758 (S.D.N.Y 1963). See sub-para. ‘Rebutting the Existence of the Peril’, at p.190.

loading plan, log books, which may help the claimant disprove the seaworthiness of the vessel.¹⁹⁵

7.8.3 The Apportionment of Liability

It was discussed in Chapter Three that it would be arguably fairer if the carrier was not allowed to rely on any of the excluded perils/causes unless he had proved first that he exercised due diligence in respect of the matter in question. However, it is also arguable that fairness and practicality dictate that the defendant carrier should not be answerable for the entire damage if he adduced evidence that gives an indication about the extent to which he was responsible for.¹⁹⁶ It was therefore argued in Chapter Three¹⁹⁷ that the court should be allowed to exercise discretion in apportioning the loss between the contributing causes and the carrier should not be held answerable for the entire damage that is caused by more than one causes, e.g. damage caused partially by unseaworthiness and partially by an excluded peril, e.g. the fault of shipper. The extent of loss of each party may be determined by using a court's own system to apportion liability.¹⁹⁸ Thus, the carrier may be liable for only part of the loss even if the carrier cannot establish the extent to which a loss was due to

¹⁹⁵ See sub-para. 'Rebutting the Existence of the Peril', at p.192.

¹⁹⁶ The obligation under Article III, r.1 has been construed as an 'overriding obligation' and if the carrier has failed to fulfil this obligation, he cannot rely on a defence listed in Article IV, r.2. See the discussion on this point in para. 3.6, at p.200.

¹⁹⁷ See para. 3.5, at p.197.

¹⁹⁸ Asariotis, R., 'Burden of proof and allocation of liability for loss due to a combination of causes under the new Rotterdam Rules', (2008) JIML 537-554, at p.543; same point in Asariotis, R., 'Loss due to combination of causes: burden of proof and commercial risk allocation', cited as Chapter 6 in R. Thomas (ed.), *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules*, (Lawtext Publishing Limited, 2009), at p.148.

something other than his own negligence.¹⁹⁹ It is arguably fairer to apportion the loss if the possible defence is the fault of the shipper rather than, e.g. perils of the seas.

The counter argument to this suggestion is that this approach might lead to non-harmonised decisions by national courts as each court would apply their own rules and this might lead to forum shopping by the parties.²⁰⁰

Generally, the commercial world is dissatisfied with the current state of the law on liability for unseaworthiness and there have been calls in this respect for reform in favour of the cargo-interests.²⁰¹ Part Two of Chapter Two assessed whether the Rotterdam Rules provide a solution.

7.9 Burden of Proof under the Rotterdam Rules

It has been mentioned that the Hague/Hague-Visby Rules are silent as regards who should prove what. What has been provided by the Rotterdam Rules?

7.9.1 The Impact of Codification on Allocation of Risk

¹⁹⁹ Asariotis, R., 'Loss due to combination of causes: burden of proof and commercial risk allocation', cited as Chapter 6 in R. Thomas (ed.), *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules*, (Lawtext Publishing Limited, 2009), at p.152; at p.210.

²⁰⁰ See para. 3.5, at p.198.

²⁰¹ Treitel, G. and Reynolds, F., *Carver on Bills of Lading*, (Sweet & Maxwell, 2011), para. 9.243; Tetley, W., *Marine Cargo Claims*, (Blais, 4th ed., 2008), p.889; Margetson, N., *The system of liability of articles III and IV of the Hague [Visby] Rules*, (Paris Legal Publishers, 2008), p.180; Ezeoke, C., 'Allocating onus of proof in sea cargo claims: the contest of conflicting principles', [2001] LMCLQ, 261; Wijffels, R., 'Legal aspects of carriage in containers' (1967) *Transportrecht*, 331-349, p.345.

The codification of the burden of proof in the Rotterdam Rules follows the current general practice in many jurisdictions.²⁰² In the US, for example, COGSA is, in terms of the burden of proof and liability, to a large extent²⁰³ the same as the new Rotterdam Rules.²⁰⁴ Potentially, the extent of changes will depend on how the courts in different jurisdictions will interpret Article 17 of the Rotterdam Rules. Part of such changes will depend on the way that the court had interpreted the Hague/Hague-Visby Rules. As discussed in Chapter Three, the Rotterdam Rules has codified the initial hurdle for the claimant in respect of proving his case. It is suggested that this codification brings certain advantages in that²⁰⁵ (a) it might provide an alternative way to adduce *prima facie* evidence which solves the difficulties in proving that unlocalised damage occurred during the period of responsibility;²⁰⁶ and, (b) codification makes easy the difficulties in discovering the delay, i.e. reference made to the words 'events or circumstances' in Article 17(5)(b) would make it possible to prove a delay that is caused by unseaworthiness rather than proving the delay itself. One useful outcome of the codification of the burden of proof is that the burden is now applicable to inland transportation modes. Thus, a claim might be raised for loss that occurred during the sea carriage (where the sea carrier is responsible only for damage caused within his period of responsibility and not damage that

²⁰² There have been arguments from some States that the new burden of proof is complicated and imposes a significant change compared to current international law. See Hooper, C., *Book Review*, (2010) 41 JMLC 145, p.150, whereas many others believe that the new convention simply codifies the current practice of the Chinese Maritime Code. On this point, see Tuzhou, S. and Li, H. H., 'The New Structure of the Basis of the Carrier's Liability under the Rotterdam Rules', (2009) 14 *Uni. L. Rev.* 931, p.942.

²⁰³ With the exception that the Vallescura rule was not included in the Rules.

²⁰⁴ Sturley, M., 'Modernizing and reforming US Maritime law: The impact of the Rotterdam Rules in the United States', (2009) 44 *T.I.L.J.* 427, p.9.

²⁰⁵ See sub-para. 'The potential advantage / disadvantage in codifying the claimant's *prima facie* evidence', at p.207.

²⁰⁶ See sub-para. 'a) The inference raised from the *prima facie* loss of, or damage to, the cargo that occurred outside the period of responsibility/carriage of the container by the sea carrier', at p. 207.

caused during the inland carriage) and for loss that was caused during another carriage leg (i.e. where the inland carrier is responsible for such damage).²⁰⁷ As regards the second stage of a claim,²⁰⁸ it is clear that the Rotterdam Rules took into account both the civil and common law regimes. The carrier must either prove that at least one of the causes of the loss was caused by something not attributable to his fault (Article 17(2)), or alternatively, that one or more of the listed excepted perils caused or contributed to the loss (Article 17(3)). This separation is important to provide a choice under Article 17(2) similar to that under Article IV, r.2(q), which has been used by mainly civil law countries, e.g. France, where their systems have, historically, not used the exclusion list under Article IV, r.2(a)-(p) of the Hague/Hague-Visby Rules (similar but not identical to Article 17(3)).²⁰⁹ However, Article IV, r.2(q) of the Hague/Hague-Visby Rules differs from the Article 17(2) of the Rotterdam Rules. The catch-all exclusion (Article IV, r.2(q)) under the Hague/Hague-Visby Rules, may be interpreted as an *ejusdem generis* to the rest of the exclusion list in Article IV, r.2(a)-(p) of the Hague/Hague-Visby Rules.²¹⁰ Whereas, the language of Article 17(3) in the Rotterdam Rules is clear to lend itself to being an alternative means of liability exemption to the approach of Article 17(2)) in the system of liability provided for by the Rotterdam Rules.²¹¹ It was argued that it seems easier for the carrier to invoke Article 17(3) than Article 17(2).²¹²

Further, a close reading of Article 17(2) with Article 18 finds that, although the burden of proof appears to be easier (for instance, the carrier's defence is not

²⁰⁷ See sub-para. '(b) The inference raised from the prima facie delay occurred during the sea carriage', at p.208.

²⁰⁸ See para. 3.9.2, at p.209.

²⁰⁹ See para. 3.9.2, at p.209.

²¹⁰ See para. 3.9.2, at p.210.

²¹¹ See para. 3.9.2.2, at p.217.

²¹² See sub-para. '(a) The language of Article 17(3)', at p.218.

subject to the overriding seaworthiness obligation), the carrier is liable at all times even if the stevedore's acts are outside of the delegated tasks. How does the inconsistency between Articles 17(2) and 18 affect the liability of the carrier?²¹³

One can state that, under the Hague/Hague-Visby Rules, in order for the carrier to succeed under the Article IV, r.2(q) exception in circumstances such as in *The Chyebassa*, the carrier will need to prove that the theft was without his fault and for this purpose, essentially, without the fault or neglect of his agents, that is, the port's stevedoring company. If the act causing the unseaworthiness (which, in turn, caused the loss or damage) is not within the scope of the employee's delegated task (in these circumstances stealing), the carrier will be successful.²¹⁴ The Rotterdam Rules, under a continued obligation to exercise due diligence to provide a seaworthy vessel, would reverse the ruling and render the carrier liable for the action of the stevedores under Article 18. Under Article 18(d) of the Rotterdam Rules, the carrier will be liable for the acts or omissions of his employees (or others within Article 18) even if they perform an obligation which is unrelated to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods.²¹⁵ For example, the carrier will still be liable for fault of the stevedores, even if their act was outside the course of employment, if the act makes the ship unseaworthy and causes damage to cargo during the voyage.²¹⁶ By comparing the two sets of rules, under Article IV, r.2 (q) of the Hague/Hague-Visby Rules, the carrier's burden of proof is heavier

²¹³ See sub-paragraph, 'The liability of the carrier attributed to his agent's negligence', p.212.

²¹⁴ See sub-paragraph, 'The liability of the carrier attributed to his agent's negligence', p.213.

²¹⁵ See sub-paragraph, 'The liability of the carrier attributed to his agent's negligence', p.214. Sturley, M., *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, (Thomson Reuters Legal Limited, 2010), p.145.

²¹⁶ See sub-paragraph, 'the liability of the carrier attributed to his agent's negligence', p. 215.

as he must first overcome the hurdle of the overriding seaworthiness obligation, but the carrier can escape liability in the absence of fault or neglect on his part and on the part of his employees and agents even if the act caused unseaworthiness.²¹⁷

At stage three of Article 17(5),²¹⁸ if the carrier has pleaded one of the listed exception perils, the claimant can prove, pursuant to Article 17(5)(a), that the loss, damage or delay was 'probably' caused or contributed to by the unseaworthiness of the vessel. The carrier can then prove, pursuant to Article 17(5)(b), that none of the events relied on by the claimant caused the loss or that it exercised due diligence as to seaworthiness. What is the significance of the word 'probably'? How does this provision differ from the approach of current law?

7.9.2 The 'Probable' Standard of Causation

Chapter Three put forward arguments as to the potential interpretation of the word 'probable'.²¹⁹ Article 17(5) is silent regarding the word 'probably'. This suggests that the standard of causation is left to the national court to decide. One cannot judge precisely whether Article 17, in general, has shifted the responsibility towards the carrier. For that reason, each new phrase or word will need to be re-tested at great expense,²²⁰ but also, the outcome of the

²¹⁷ For further information, see subtitle: *Must the carrier prove an excepted peril to rebut the presumption?* Tetley, W., *The burden and order of proof in marine cargo claims* at p.9 cited in <http://www.cmla.org/papers/The%20Burden%20and%20Order%20of%20Proof%20in%20Marine%20Cargo%20Claims.pdf>.

²¹⁸ See Chapter Three, para.3.9.3, at p.223. See also para. 3.9.3.1, at p.223.

²¹⁹ See Chapter Three, para.3.9.3.3, at p.226.

²²⁰ Force, R., 'A Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much ado about?' (1996) 70 Tul. L. Rev. 2051, p.2088; Hill, M., *Shipowners Liability for Loss or Damage to*

interpretation might not shift the balance towards the claimant. For example, it may result in the English court regarding the word as indicating balance of probability rather than a lowering of the standard of causation.²²¹ Comparing the language of paragraph (5)(a) with (5)(b)(i) of Article 17, the latter has excluded the word 'probability' that relates to the word proof. This suggests that the standard of proof, i.e. the standard of evidence, required by the claimant is somehow less than that required by the carrier to prove causation. If this is followed by the court, a relatively lesser level of evidence is acceptable when comparing it with the level of evidence required from the carrier. This should prevent an English court interpreting the word 'probability' as referring to the 'balance of probability'.²²² A question automatically emerges: What will the standard of 'probability' be dependent on? Alternatively, what is the potential approach of the court in deciding the level of evidence?

Chapter Three²²³ discussed that the court is likely to set a benchmark that may affect the standard of causation based on case law, on which it will decide the standard of probability. The first factor²²⁴ that the court may consider is that it is even more difficult for the claimant to prove the unseaworthiness of the vessel as a cause of damage when she is at sea as opposed to when she is at port.²²⁵

Cargo - Economic Implications of Hague-Visby and Hamburg Rules, Conference of the International Union of Marine Insurance (Bern, 1992), p.5; UNCTAD, *The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention*, (TD/B/C.4/315/Rev.1) (United Nations, New York 1991), paras. 17 and 26.

²²¹ See para.3.9.3.3, at p.229

²²² See para. 3.9.3.3, at p.229. At least, the current law, often, in the absence of possible causes, regards unseaworthiness as a probable cause. *The Subro Valour* [1995] 1 Lloyd's Rep. 509.

²²³ See para.3.9.3.4, at p.230.

²²⁴ See sub-para. '(a) Stage of the Voyage', at p.230.

²²⁵ See Brons, W-P., 'The Legal Position of the Carrier in the Light of the Rotterdam Rules', cited as a chapter in R. Lagoni (ed.), *Recent Developments in the law of the sea*, (Schriften zum See-und Hafenrecht, 2010), 180, p.216.

The second factor²²⁶ is that the dynamic standard of due diligence required by the carrier might determine the standard of causation. For example, when a defect that causes unseaworthiness during sea carriage emerges, the carrier may be required to demonstrate that there were no further necessary actions, e.g. preventing water flow from spreading to other cargo holds, other than exercising due diligence in repairing the defect to keep the vessel seaworthy. The claimant might need to prove that, in addition to the defect that caused the damage, the crew were incompetent to stop the flow of water from reaching other cargo-holds where cargo could have been saved. The level of due diligence imposed on the carrier for a particular time and for a particular ship may determine whether the vessel is seaworthy or not, and thus change the level of the burden of proof required by the claimant to discharge his burden.

The third factor²²⁷ would be that the court may treat the word 'probable', in reference to both 'caused' and 'contributed' differently, so that the standard of probability for causation is not the same and may be higher than the standard of probability for concurrent events, one of which being unseaworthiness. Hypothetical examples were given to support the conclusion that it is easier, at least theoretically, for the claimant to prove damage that was caused partially by unseaworthiness in comparison to proving damage that was caused solely by unseaworthiness.²²⁸ The relevant evidence and facts that are needed to prove causation are likely to be fewer and easier to collect. Thus, it might be

²²⁶ See sub-para. 'The level of probability might depend on the standard of due diligence on the part of the carrier during the voyage', at p.232.

²²⁷ See sub-para. '(c) Differentiation between proving the 'cause of' or 'contribution to unseaworthiness', at p.235.

²²⁸ See sub-para. '(c) Differentiation between proving the 'cause of' or 'contribution to unseaworthiness', at p.235.

logical if courts assume that the word 'probably' should apply to the word 'cause' only.

The fourth factor²²⁹ could be that the court might consider the act or omission of the carrier that increased the peril that caused the unseaworthiness as a factor to bridge any evidentiary gap regarding causation. This means that the court may lessen the standard of probability and treat the omission that increased the risk as an adequate probability of unseaworthiness as a cause of or contribution to the damage and, in turn, the loss.

Regarding the fifth factor,²³⁰ the court might view the word 'probably' as superfluous if the provisions of Article 23(6)²³¹ impose an obligation to disclose material information to the other party where there is loss or damage to the goods.

The Time of Occurrence of the 'event or circumstance' that caused the Unseaworthiness: Is Proof required?

The rules are silent on whether the claimant, to prove unseaworthiness, should be required to prove the time at which the unseaworthiness occurred. There are three potential approaches that a court may adhere to. First,²³² one might suggest that inasmuch as the obligation of due diligence is required to be exercised for the entire voyage, then it is sufficient that the claimant proves the

²²⁹ See sub-para. '(d) Increase of risk causing an increase of the probability of loss as an alternative in establishing the causal connection', at p.240.

²³⁰ See sub-para. '(e) Duty to facilitate the taking of evidence', at p.243.

²³¹ It was discussed that there is no penalty for not complying with the obligation in Article 23(6) thus, the carrier may not be encouraged to comply. Chapter Three has suggested a redrafting of the same Article, see para.3.10, at p.254.

²³² See sub-para. 'a) Proof is not required', at p.246.

unseaworthiness and that it caused or contributed to the loss, regardless of the time of its occurrence. Support for the above proposition can be given by reference to the language of Article 17(5)(a), which does not include any requirement to prove when the causative unseaworthiness occurred. A second approach is presumed to be more realistic²³³; on the presumption that the court will apply a different standard of due diligence for the period before and after the commencement of the voyage, this will require that the time of the causative unseaworthiness be proved. It was argued with support of a hypothetical example that the claimant will not be required to prove the timing at which unseaworthiness occurred. Any burden in respect of the timing will be borne by the carrier. It was discussed that the timing issue becomes more acute when seen from a multimodal transport viewpoint, where differing regimes of inland and sea carriage, e.g. Hague/Hague-Visby Rules, apply. Mainly, the emergence of containerised transport, as a result of which it is difficult to prove the stage of carriage (whether sea or inland) that the damage has occurred inside a sealed container.²³⁴

Thus, some courts may be of the opinion that a claimant should prove, along with unseaworthiness and causation pursuant to Article 17(5)(a), the time at which the unseaworthiness occurred.²³⁵ Otherwise, a court may infer that the time at which the unseaworthiness occurred was later than the actual time that it occurred for example, from an evidential perspective, if the claimant has not adduced evidence demonstrating when a defect arose, e.g. at an early stage of carriage, it could be difficult to say what could have been done about it and

²³³ See sub-para, 'b) Proof is required', at p.247.

²³⁴ See sub-para, 'b) Proof is required', at p.249.

²³⁵ Sub-para, 'b) Proof is required', at p.248.

whether due diligence was exercised sufficiently and without unreasonable delay. From some evidence, the court would know that due diligence was not sufficiently exercised, e.g. stopping the flow of water while fixing a defect, and the claimant, as a result, would be compensated for the added damage caused from not stopping the flow of water or maybe from not acting promptly.²³⁶ It may be that where the issue is whether the exercise of due diligence may not have been sufficient to detect a developing unseaworthiness, some evidence of when the defect arose might be necessary to test whether due diligence was exercised and was sufficient. It might be logical to put a potential evidential burden on the claimant in testing the carrier's evidence of due diligence.

A third approach was also discussed,²³⁷ suggesting that in the context of damage caused partially by an excluded peril and partially by unseaworthiness, it is imperative for the claimant to prove the timing at which the unseaworthiness occurred, e.g. whether before or after the unseaworthiness. The sequence of the occurrence of each of the two causes (the seaworthiness and the excluded peril) is important, as the court in deciding the respective liability will decide the proportion of the loss or damage attributed to unseaworthiness on the basis of the point in time at which the 'event or circumstance' causing the unseaworthiness occurred before or after the excluded cause. It was suggested that Article 15(b) provides that the burden is on the carrier to prove the exercise of due diligence, which might indirectly create a requirement to prove the time of the occurrence of the causative unseaworthiness on the carrier.²³⁸

²³⁶ Sub-para, 'b) Proof is required', at p.248.

²³⁷ See, sub-para. 'c) Concurrency of Causative Unseaworthiness and Exempted Causes: Is Proof Required and by Whom', at p.250.

²³⁸ See, sub-para. 'c) Concurrency of Causative Unseaworthiness and Exempted Causes: Is Proof Required and by Whom', at p.250.

Once proof of seaworthiness and the probable causation is successfully shown, the onus is then shifted to the carrier to either, pursuant to Article 17(5)(b)(i), prove the lack of causation or, alternatively, prove that due diligence was exercised, according to Article 17(5)(b)(ii).²³⁹

An overall reading of Article 17 shows a shift of risk and liability towards the claimant under the Rotterdam Rules; the carrier has, at all stages of liability, been encouraged to exonerate himself from liability. On the one hand, the doctrine of the overriding obligation of seaworthiness does not exist anymore under the Rotterdam Rules where the lack of due diligence defeats an exception. In other words, the overriding effect is to defeat a potential applicable defence when it is a cause of damage. On the other hand, it is sufficient to say that the overriding effect of the obligation to exercise due diligence to make the ship seaworthy does not make the carrier liable if unseaworthiness is not a cause of the damage.

To conclude on the above points, the Rotterdam Rules seems to not fully solve the problem of liability under the current law and the claimant still faces a heavy burden to prove unseaworthiness. Only the court can take into consideration that the word 'probability' is there to reduce the burden on the claimant in terms of a lesser standard of probability of causation, which makes it easier to shift the burden to the carrier, who is required to disprove the causation under Article 17(5)(b)(i). Alternatively the carrier may choose to prove, pursuant to Article 17(5)(b)(ii), that due diligence was exercised.²⁴⁰

²³⁹ See para. 3.9.4, at p.251.

²⁴⁰ See para.3.9.4, at p.251

However, it was discussed that it may be more convenient for the carrier to disprove the fact that unseaworthiness caused the damage under Article 17(5)(b)(i) than proving the exercise of due diligence under Article 17(5)(b)(ii).²⁴¹ One point to support this suggestion is that the imprecise drafting of Article 17(5)(b)(ii) might cause confusion as to whether the carrier is required to prove that he exercised due diligence generally or just in relation to the suggested unseaworthiness.²⁴²

7.10. The Apportionment of Liability under the Rotterdam Rules

The draftsmen of the Rotterdam Rules considered the apportionment problem under the current law and, thus, had the intention to qualify that the carrier should be liable only for the loss for which he is responsible. There are different types of causal combinations,²⁴³ such as concurrent causes and competing causes.²⁴⁴ In short, if it is a matter of different causes causing part of the loss, then Article 17(6) of the Rotterdam Rules only relieves the carrier for the liability known to have been caused by the excepted peril. Whether Article 17 of the Rotterdam Rules covered the system of the apportionment of damage is a matter summarised in the next two paragraphs.²⁴⁵

- Concurrent Causes, One of which is Unexplained

²⁴¹ See para. 3.9.4, at p.253.

²⁴² It was discussed that under Article 17(5)(a) the claimant is required to prove unseaworthiness as a cause of damage from one of the seaworthiness facets specified (i)-(iii); in comparison, Article 17(5)(b) does not outline the three facets of seaworthiness. Article 17(5)(b)(ii) may imply that the carrier would be required to prove that he exercised due diligence to all of the facets of seaworthiness. See para. 3.9.4, at p.254.

²⁴³ See para.3.11.1., at p.256.

²⁴⁴ Note that the reference is mainly made to concurrent causes, where “each event causes part of the damage but none of these events alone was sufficient to cause the entire damage.” Further explanation as regards the difference between concurrent and competing causes can be found at para.3.11.1, at p.256.

²⁴⁵ See para. 3.11, at p.256.

It was discussed²⁴⁶ that, if the matter is left to the court to decide, each jurisdiction would exercise its own methods to allocate the burden of proof. Nonetheless, the courts must be careful when finding the responsible party. The carrier might refrain from showing evidence that renders him liable for any negligence or fault of exercising due diligence and allege that the cause of loss is unexplained.²⁴⁷ Different views were given regarding who should be responsible for unexplained losses. It may be a solution to impose, on the carrier, the burden to prove the cause of the loss.

- Concurrent Causes, One of which is Unseaworthiness

Article 17(2)-(5) is not explicit as to who must prove what and to what extent the events or circumstances of the excepted peril contributed to the loss, in relation to which the carrier can be excluded.²⁴⁸ It is also not clear at which stage this would be considered. It was suggested in Chapter Three that courts in different jurisdictions might adopt different approaches.

One possible approach²⁴⁹ might be that proving the extent of liability should be connected with the burden of proof that is imposed on each particular party at a particular stage of the burden of proof. Another interpretation could be that if the carrier proves that one or more of the events or circumstances (the excluded perils) caused or contributed to the loss, courts could also impose on the carrier the burden of determining the extent of the loss. Similarly, when the burden is

²⁴⁶ See para. 3.12, at p.263.

²⁴⁷ See para. 3.11.1, at p.258

²⁴⁸ See the outline of the multiple stages of the burden of proof under Article 17 in para. 3.11.1.1, at p.260.

²⁴⁹ See Chapter Three, para. 3.12.1, at p.263.

reverted to the claimant, as in the example under Article 17(5), the court may impose the burden of determining the extent of liability on the claimant.²⁵⁰

Another possible approach²⁵¹ would involve giving the court the flexibility in determining the apportionment of liability between the two parties (carrier and cargo-claimant) where both jointly contributed to the damage of the cargo. This approach is closer to the intention of the drafters when most of what was proposed in WG III has not persisted. It was discussed²⁵² in Chapter Three that for many reasons one should not, due to the imprecise wording of Article 17, assume that Article 17(5) could be read to mean that a court in its discretion could apply either one of two consequences, i.e. relief from all liability or relief from part of the carrier's liability if either one of two scenarios was the sole cause of the loss or a contributory cause of the loss is proven. One reason could be that, as far as English law is concerned, the carrier is responsible for the whole loss even if an excepted peril is operative, but this has no place under the Rotterdam Rules.²⁵³ Another reason is that the drafters of the Rotterdam Rules stated that liability must be apportioned on the basis of the previous paragraph, e.g. Article 17(1)-(5).²⁵⁴ Thus, Article 17(6) should not be considered as the stage of apportionment if it is being taken on its own.²⁵⁵

²⁵⁰ See para. 3.12.1, at p.263.

²⁵¹ See, para. 3.12.2, at p.267.

²⁵² See para. 3.13, at p.269.

²⁵³ See para. 3.13, at p.269.

²⁵⁴ See para. 3.13, at p.270.

²⁵⁵ See para. 3.14, at p.270.

7.11 Concluding Remarks

In the previous Chapters of this study, the provisions relating to liabilities and obligations connected with seaworthiness were examined to ascertain their satisfactory and unsatisfactory aspects. This investigation has concluded that the Hague/Hague-Visby Rules do not meet the needs of dealing with seaworthiness for the following reasons in brief:

1. As Chapter Two, Part One has demonstrated, the obligation of due diligence is limited to the commencement of the voyage, and the risk is imbalanced between parties.²⁵⁶
2. In the same Part, it was demonstrated that courts have not considered most of the elements, which determine the exact time at which the obligation ends.²⁵⁷ This creates unbalance between interests due to the uncertainty of time at which the potential risk of the contemplated voyage starts.
3. As Chapter Three, Part One has demonstrated, due to the fact that the burden of proof is on the claimant to prove unseaworthiness, the claimant faces difficulties, i.e. in collecting evidence, to discharge the burden of proving the vessel's unseaworthiness.²⁵⁸
4. It was demonstrated that the obligation under Article III, r.1 has been construed as an 'overriding obligation', and if the carrier fails to fulfil such an obligation, he cannot rely on a defence listed in Article IV, r.2. As a

²⁵⁶ See para. 2.6.2, at p.100.

²⁵⁷ See in general para. 2.7 and para. 2.7.2, at p.119.

²⁵⁸ See para. 3.2.3.1, at p.178.

result, the apportionment of liability for concurrent causes is not allowed under the Hague/Hague-Visby Rules.²⁵⁹

5. It was demonstrated that, in view of technological advances over the last 90 years, the exclusion of a carrier from nautical fault would be rendered, as reducing the degree of care, unjustifiable.²⁶⁰
6. As Chapter Four demonstrated, the criteria of ascertaining the seaworthiness of the vessel is, to some extent, determined by shipping industry regulations (the STCW Convention, SOLAS, MARPOL, and so on). Those regulations have, in themselves, some gaps and, on their reliance in determining the seaworthiness of the vessel, the risk between the parties would be imbalanced and tipped further towards the carrier.²⁶¹
7. As Chapter Six demonstrated, the obligation of exercising due diligence to provide a seaworthy vessel under Article III, r.1 of the Hague/Hague-Visby Rules is not clear among different States in relation to the supply of fit containers, thus, the carrier would be less committed to supply fit containers.²⁶²
8. Chapter Five illustrated that the Rotterdam Rules take into account transport by other modes and provide the option to extend the scope of the Rules to cover land carriage. Should the Rotterdam Rules be enforced internationally, a problem will arise in that the door-to-door scope of the Rotterdam Rules would impact on the container and thus

²⁵⁹ See para. 2.16.2, at p.145.

²⁶⁰ See sub-para. 'The principle of allocation of risks, at p.221. See also sub-para. 'The principle of inconsistency with other transport modes', at p.222. See also para. 3.15, at p.272

²⁶¹ See in general para's. 4.4.2-4.5. See also para. 4.6.1, at p.313.

²⁶² See para. 6.1, at p.388.

the seaworthiness of the vessel.²⁶³ This would defeat the object of contracts for multimodal transport. Until amendments to the multimodality part of the Rotterdam Rules are made, the Rules should not govern door-to-door contracts.²⁶⁴

During the debates around the Rotterdam Rules, it was mentioned that the majority of States are so concerned about the failure of the current international carriage conventions to cope with modern shipping practices that if an international solution is not found, a regional European one might be promulgated. Should the Rotterdam Rules become the law to govern the obligation and liability relating to seaworthiness instead of redrafting the provisions of the existing regime? Would they suffice to create a sound regime?

Throughout the thesis, it was demonstrated that the Rotterdam Rules bring about the following changes:

1. Chapter Two, Part Two illustrated that the obligation of exercising due diligence to provide a seaworthy vessel is continuous under the Rotterdam Rules. This will surely balance the risk between the parties.²⁶⁵
2. In the same Part, it was illustrated that the extension of due diligence to the entire voyage has solved the problem of ascertaining the end of the due diligence obligation in respect of 'before and at the beginning of the voyage'. However, this problem seems to emerge again when deciding

²⁶³ See para's 5.6 - 5.9.

²⁶⁴ See para. 5.10.1. Also see para. 5.10.2 for a non-mandatory solution.

²⁶⁵ See in general para. 2.14.1, at p.128. Baatz, Y., *The Rotterdam Rules, A practical annotation*, (Informa, 2009), "*The extended obligation of seaworthiness is arguably one of the most important changes in the Rotterdam Rules liability regime*", para. 14-01.

whether the end of the due diligence obligation is at the end of the voyage or when the cargo is totally discharged.²⁶⁶

3. Chapter Six illustrated that the supply of containers is included in the obligation to exercise due diligence to provide a seaworthy vessel. This will result in harmonisation with regard to container cargoworthiness amongst the different jurisdictions.²⁶⁷ Also, further care would be paid in supplying containers that will result in balancing the risk between the parties.
4. Chapter Three, Part Two illustrated that the effect of Article 17(5)(a) of the Rotterdam Rules is to reduce the burden of proof on the claimant by requiring the claimant to prove merely the 'probable' cause of seaworthiness. However, this will be dependent on how a national court interprets the word 'probable'.²⁶⁸
5. In the same Part, it was illustrated that Article 17 has qualified the apportionment of liability; however, the matter needs to be tested at court.²⁶⁹
6. In the same Chapter, it was illustrated that the 'navigation fault' is deleted under the Rotterdam Rules. As a result, a better balance has been brought about as carriers will be more committed to the disciplines of maritime safety and training of crew.²⁷⁰
7. Chapter Four illustrated that the potential result of extending the exercise of due diligence to the entire voyage would put the standard of

²⁶⁶ See para. 2.13, at p.124.

²⁶⁷ See para. 6.4.1.2, at p.425.

²⁶⁸ See para. 3.12.1.1, at p.264.

²⁶⁹ See para. 3.9.4, at p.252.

²⁷⁰ See sub-para. '(c) Deletion of the error in navigation exception', at p.219

seaworthiness in line with the latest developments of the industry.²⁷¹ Also, it would not restrict the standard of seaworthiness to match the outdated standard of some shipowners. Enhancing this result may require the Member States to take on policing measures to ensure adequate implementation with the regulations.²⁷²

8. Chapter Five illustrated that the Rotterdam Rules take into account transport by other modes and allows the choice of extending the scope of cover to land carriage. Should the Rotterdam Rules be enforced internationally, despite the problems that emerge under the door-to-door scope, they would impact on the standard of the container and thus the seaworthiness of the vessel.²⁷³ The solution is to conclude the contract of carriage with regard the sea carriage only, which is an option available to the parties.²⁷⁴ However, this would defeat the object of contracts for multimodal transport. Therefore, there should be an amendment to the multimodality part of the Rules, in particular those provisions, which potentially allow to derogate from or cancel out the obligation of seaworthiness in general and the container cargoworthiness obligation in particular.²⁷⁵

From the foregoing analysis of the problems surrounding the law of seaworthiness, it is believed that a case for revising standard terms and conditions to meet the new legal standards is essential not merely to solve

²⁷¹ See para. 4.6.1, at pp.314-318.

²⁷² See para. 4.5.1, at p.311.

²⁷³ See para. 5.6, at p.358.

²⁷⁴ See para. 5.10.2, at p.381.

²⁷⁵ See para. 5.6.1, at p.359.

problems, but also to gain considerable steps towards improving the standards of the 21st century shipping industry.

The recent changes in German law²⁷⁶ and standard forms,²⁷⁷ alongside the moves of some States to ratify the Rotterdam Rules,²⁷⁸ provide examples that demonstrate the inclination for some States to reform the current carriage of goods regime and the law relating to seaworthiness.²⁷⁹ However, it is essential that any revised or reformed law provides a comprehensive and modern legal framework without losing sight of the modern shipping technology that made an urgent need for an international regime rather than producing a model law.²⁸⁰ A model law perhaps is a useful short-term or temporary solution to pave the way for unification and lower the threshold for fairness between parties in front of a long-term solution of amending and adopting the Rotterdam Rules. This is to say that when amending the current law or the Rotterdam Rules, one should aim to facilitate the balance of justice and enable uniformity in its applications.

As a result of the above discussions, the author is of the view that the Rotterdam Rules should not be adopted to govern the rights and obligations of

²⁷⁶ The new German Maritime Trade Law (came into force on 21 April 2013). Some significant changes in the German Law are similar to the Rotterdam Rules; (1) the law abolishes the exclusion of liability for damages due to error in navigation or fire, and (2) extends the period of responsibility beyond the tack-to-tackle stage. Under the new law, the carrier cannot exclude his liability by virtue of individual agreements and the incorporation of general terms and conditions into the contract. The carrier remains liable for loss of and damage to goods while they are in his (or his subcontractors) custody.

²⁷⁷ Such as Exxonmobile Voy2012, provide the Rotterdam Rules into the paramount clause, in which the bill of lading shall have effect subject to the Rotterdam Rules.

²⁷⁸ Moves are under way to introduce a bill into Parliament by mid-2014 designed to accelerate the process of ratification by the Netherlands of the Rotterdam Rules. Further, in July 2013, the US State Department has completed its 'ratification package' for the Rotterdam Rules. It is believed that the Rotterdam Rules have now cleared a significant hurdle on their way to ratification by the US.

²⁷⁹ See Chuah, J., The New German Act on the Reform of Maritime Trade Law, [2013] 19 JIML, p.6.

²⁸⁰ Hashemi, S., "The Rotterdam Rules: A blessing?" (2012) LMLJ, 227-267, p.227. It was stated that: "*It can be argued that adoption of uniform rules to harmonise and bolster international trade will not only enhance legal certainty, but also play a fundamental role to facilitate new access opportunity, reduce legal obstacles to the flow of international trade among all states, and improve efficiency, both domestically and internationally.*"

parties in general and the seaworthiness obligation in particular. The Rotterdam Rules should be sent back to the drafters with comments and constructive criticism in order for amendments (such as those discussed in this Chapter and those raised by academics) to be made. On balance, the Rules do not improve the current law, nor do they balance the parties' relationship. The Rotterdam Rules do not provide a comprehensive and modern legal framework, especially as regards the multimodality provisions and liability of the carrier provisions.

If the current law is not reformed by the legislature, it is hoped that judges in this and other jurisdictions appreciate that it might be time for courts to react accordingly. It is hoped that courts in various jurisdictions act in a way that provides a harmonised approach, which balances fairness between the parties. Nonetheless, this might only be achievable in common law countries where judges are not restricted in their actions by the legislator.

APPENDICES

The Hague-Visby Rules- The Hague Rules as Amended by the Brussels Protocol 1968

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The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968

Article I

In these Rules the following words are employed, with the meanings set out below:

(a) 'Carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) 'Contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) 'Goods' includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) 'Ship' means any vessel used for the carriage of goods by sea.

(e) 'Carriage of goods' covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

Article II

Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

Article III

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

(a) Make the ship seaworthy;

(b) Properly man, equip and supply the ship;

(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

3. After receiving the goods into his charge the carrier or the master or agent of the

carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage. 18

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper. 19

(c) The apparent order and condition of the goods. 20

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking. 21

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith. 22

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper. 23

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. 24

The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection. 25

Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period, may however, be extended if the parties so agree after the cause of action has arisen. 26

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods. 27

6 bis. An action for indemnity against a third person may be brought even after the 28

expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.

7, After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands be a 'shipped' bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article III, shall for the purpose of this article be deemed to constitute a 'shipped' bill of lading.

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

Article IV

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

- (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.
- (b) Fire, unless caused by the actual fault or privity of the carrier.
- (c) Perils, dangers and accidents of the sea or other navigable waters.
- (d) Act of God.
- (e) Act of war.
- (f) Act of public enemies.

(g) Arrest or restraint of princes, rulers or people, or seizure under legal process.	40
(h) Quarantine restrictions.	41
(i) Act or omission of the shipper or owner of the goods, his agent or representative.	42
(j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.	43
(k) Riots and civil commotions.	44
(l) Saving or attempting to save life or property at sea.	45
(m) Wastage in bulk of weight or any other loss or damage arising from inherent defect, quality or vice of the goods.	46
(n) Insufficiency of packing.	47
(o) Insufficiency or inadequacy of marks.	48
(p) Latent defects not discoverable by due diligence.	49
(q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.	50
3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.	51
4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.	52
5 (a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 666.67 units of account per package or unit or units of account per kilo of gross weight of the goods lost or damaged, whichever is the higher.	53
(b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.	54
The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.	55

(c) Where a container, pallet or similar article of transport is used to consolidate goods, 56
the number of packages or units enumerated in the bill of lading as packed in such
article of transport shall be deemed the number of packages or units for the purpose of
this paragraph as far as these packages or units are concerned. Except as aforesaid
such article of transport shall be considered the package or unit.

(d) The unit of account mentioned in this Article is the special drawing right as defined by 57
the International Monetary Fund. The amounts mentioned in h_visby/art/art04_5asub-
paragraph (a) of this paragraph shall be converted into national currency on the basis
of the value of that currency on a date to be determined by the law of the Court seized
of the case.

(e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of 58
liability provided for in this paragraph if it is proved that the damage resulted from an
act or omission of the carrier done with intent to cause damage, or recklessly and with
knowledge that damage would probably result.

(f) The declaration mentioned in sub-paragraph (a) of this paragraph, if embodied in 59
the bill of lading, shall be prima facie evidence, but shall not be binding or conclusive
on the carrier.

(g) By agreement between the carrier, master or agent of the carrier and the shipper 60
other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph
may be fixed, provided that no maximum amount so fixed shall be less than the appro-
priate maximum mentioned in that sub-paragraph.

(h) Neither the carrier nor the ship shall be responsible in any event for loss or damage 61
to, or in connection with, goods if the nature or value thereof has been knowingly mis-
stated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof 62
the carrier, master or agent of the carrier has not consented with knowledge of their
nature and character, may at any time before discharge be landed at any place, or
destroyed or rendered innocuous by the carrier without compensation and the shipper
of such goods shall be liable for all damages and expenses directly or indirectly arising
out of or resulting from such shipment. If any such goods shipped with such knowledge
and consent shall become a danger to the ship or cargo, they may in like manner be
landed at any place, or destroyed or rendered innocuous by the carrier without liability
on the part of the carrier except to general average, if any.

Article IV bis 63

1. The defences and limits of liability provided for in these Rules shall apply in any 64
action against the carrier in respect of loss or damage to goods covered by a contract
of carriage whether the action be founded in contract or in tort.

2. If such an action is brought against a servant or agent of the carrier (such servant or 65
agent not being an independent contractor), such servant or agent shall be entitled to

avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.

3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in these Rules. 66

4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result. 67

Article V 68

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under these Rules, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper. The provisions of these Rules shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average. 69

Article VI 70

Notwithstanding the provisions of the preceding articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such. 71

An agreement so entered into shall have full legal effect. 72

Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement. 73

Article VII 74

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the 75

custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea.

Article VIII

76

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

77

Article IX

78

These Rules shall not affect the provisions of any international Convention or national law governing liability for nuclear damage.

79

Article X

80

The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if

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(a) the bill of lading is issued in a contracting State, or

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(b) the carriage is from a port in a contracting State, or

83

(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract;

84

whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

85

(The last two paragraphs of this Article are not reproduced. They require contracting States to apply the Rules to bills of lading mentioned in the Article and authorise them to apply the Rules to other bills of lading).

86

(Article 11 to 16 of the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on August 25, 1974 are not reproduced. They deal with the coming into force of the Convention, procedure for ratification, accession and denunciation and the right to call for a fresh conference to consider amendments to the Rules contained in the Convention).

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The Rotterdam Rules

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea



UNITED NATIONS
Vienna, 2009

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Resolution adopted by the General Assembly

63/122. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Concerned that the current legal regime governing the international carriage of goods by sea lacks uniformity and fails to adequately take into account modern transport practices, including containerization, door-to-door transport contracts and the use of electronic transport documents,

Noting that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Convinced that the adoption of uniform rules to modernize and harmonize the rules that govern the international carriage of goods involving a sea leg would enhance legal certainty, improve efficiency and commercial predictability in the international carriage of goods and reduce legal obstacles to the flow of international trade among all States,

Believing that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

Noting that shippers and carriers do not have the benefit of a binding and balanced universal regime to support the operation of contracts of carriage involving various modes of transport,

Recalling that, at its thirty-fourth and thirty-fifth sessions, in 2001 and 2002, the Commission decided to prepare an international legislative instrument governing door-to-door transport operations that involve a sea leg,¹

Recognizing that all States and interested international organizations were invited to participate in the preparation of the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea and in the forty-first session of the Commission, either as members or as observers, with a full opportunity to speak and make proposals,

Noting with satisfaction that the text of the draft Convention was circulated for comment to all States Members of the United Nations and intergovernmental organizations invited to attend the meetings of the Commission as observers, and that the comments received were before the Commission at its forty-first session,²

Taking note with satisfaction of the decision of the Commission at its forty-first session to submit the draft Convention to the General Assembly for its consideration,³

Taking note of the draft Convention approved by the Commission,⁴

Expressing its appreciation to the Government of the Netherlands for its offer to host a signing ceremony for the Convention in Rotterdam,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea;

2. *Adopts* the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, contained in the annex to the present resolution;

¹ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), paras. 319–345; and *ibid.*, *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 210–224.

² A/CN.9/658 and Add.1–14 and Add.14/Corr.1.

³ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 298.

⁴ *Ibid.*, annex I.

3. *Authorizes* a ceremony for the opening for signature to be held on 23 September 2009 in Rotterdam, the Netherlands, and recommends that the rules embodied in the Convention be known as the “Rotterdam Rules”;

4. *Calls upon* all Governments to consider becoming party to the Convention.

67th plenary meeting

11 December 2008

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA

The States Parties to this Convention,

Reaffirming their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Convinced that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality, equity and common interest, and to the well-being of all peoples,

Recognizing the significant contribution of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25 August 1924, and its Protocols, and of the United Nations Convention on the Carriage of Goods by Sea, signed in Hamburg on 31 March 1978, to the harmonization of the law governing the carriage of goods by sea,

Mindful of the technological and commercial developments that have taken place since the adoption of those conventions and of the need to consolidate and modernize them,

Noting that shippers and carriers do not have the benefit of a binding universal regime to support the operation of contracts of maritime carriage involving other modes of transport,

Believing that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

Have agreed as follows:

Chapter 1

General provisions

Article 1

Definitions

For the purposes of this Convention:

1. “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.
2. “Volume contract” means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.
3. “Liner transportation” means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.
4. “Non-liner transportation” means any transportation that is not liner transportation.
5. “Carrier” means a person that enters into a contract of carriage with a shipper.
6. (a) “Performing party” means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.

(b) “Performing party” does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.

7. “Maritime performing party” means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

8. “Shipper” means a person that enters into a contract of carriage with a carrier.

9. “Documentary shipper” means a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.

10. “Holder” means:

(a) A person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.

11. “Consignee” means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.

12. “Right of control” of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.

13. “Controlling party” means the person that pursuant to article 51 is entitled to exercise the right of control.

14. “Transport document” means a document issued under a contract of carriage by the carrier that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

15. “Negotiable transport document” means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate

wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.

16. “Non-negotiable transport document” means a transport document that is not a negotiable transport document.

17. “Electronic communication” means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.

18. “Electronic transport record” means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

19. “Negotiable electronic transport record” means an electronic transport record:

(a) That indicates, by wording such as “to order”, or “negotiable”, or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”; and

(b) The use of which meets the requirements of article 9, paragraph 1.

20. “Non-negotiable electronic transport record” means an electronic transport record that is not a negotiable electronic transport record.

21. The “issuance” of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.

22. The “transfer” of a negotiable electronic transport record means the transfer of exclusive control over the record.

23. “Contract particulars” means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.
24. “Goods” means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.
25. “Ship” means any vessel used to carry goods by sea.
26. “Container” means any type of container, transportable tank or flat, swap-body, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.
27. “Vehicle” means a road or railroad cargo vehicle.
28. “Freight” means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.
29. “Domicile” means (a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation or central registered office, whichever is applicable, (ii) central administration or (iii) principal place of business, and (b) the habitual residence of a natural person.
30. “Competent court” means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.

Article 2

Interpretation of this Convention

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Article 3

Form requirements

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 19, paragraph 2; 23, paragraphs 1 to 4; 36, subparagraphs 1 (b), (c) and (d); 40, subparagraph 4 (b); 44; 48, paragraph 3; 51, subparagraph 1 (b); 59, paragraph 1; 63; 66; 67, paragraph 2; 75, paragraph 4; and 80, paragraphs 2 and 5, shall be in writing. Electronic communications

may be used for these purposes, provided that the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated.

Article 4
Applicability of defences and limits of liability

1. Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

- (a) The carrier or a maritime performing party;
- (b) The master, crew or any other person that performs services on board the ship; or
- (c) Employees of the carrier or a maritime performing party.

2. Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees.

Chapter 2
Scope of application

Article 5
General scope of application

1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

- (a) The place of receipt;
- (b) The port of loading;
- (c) The place of delivery; or
- (d) The port of discharge.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

Article 6
Specific exclusions

1. This Convention does not apply to the following contracts in liner transportation:

- (a) Charter parties; and
- (b) Other contracts for the use of a ship or of any space thereon.

2. This Convention does not apply to contracts of carriage in non-liner transportation except when:

- (a) There is no charter party or other contract between the parties for the use of a ship or of any space thereon; and
- (b) A transport document or an electronic transport record is issued.

Article 7
Application to certain parties

Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charter party or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.

Chapter 3
Electronic transport records

Article 8
Use and effect of electronic transport records

Subject to the requirements set out in this Convention:

(a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and

(b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

Article 9

Procedures for use of negotiable electronic transport records

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:

(a) The method for the issuance and the transfer of that record to an intended holder;

(b) An assurance that the negotiable electronic transport record retains its integrity;

(c) The manner in which the holder is able to demonstrate that it is the holder; and

(d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (a) (ii) and (c), the electronic transport record has ceased to have any effect or validity.

2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

Article 10

Replacement of negotiable transport document or negotiable electronic transport record

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:

(a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;

(b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and

(c) The negotiable transport document ceases thereafter to have any effect or validity.

2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:

(a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and

(b) The electronic transport record ceases thereafter to have any effect or validity.

Chapter 4

Obligations of the carrier

Article 11

Carriage and delivery of the goods

The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

Article 12

Period of responsibility of the carrier

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.

2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.

(b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.

3. For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:

(a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or

(b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.

Article 13 *Specific obligations*

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.

2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

Article 14 *Specific obligations applicable to the voyage by sea*

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

(a) Make and keep the ship seaworthy;

(b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and

(c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

Article 15 *Goods that may become a danger*

Notwithstanding articles 11 and 13, the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment.

Article 16
Sacrifice of the goods during the voyage by sea

Notwithstanding articles 11, 13, and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.

Chapter 5
Liability of the carrier for loss, damage or delay

Article 17
Basis of liability

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.
2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.
3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:
 - (a) Act of God;
 - (b) Perils, dangers, and accidents of the sea or other navigable waters;
 - (c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;
 - (d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;
 - (e) Strikes, lockouts, stoppages, or restraints of labour;
 - (f) Fire on the ship;
 - (g) Latent defects not discoverable by due diligence;

(h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;

(i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;

(j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;

(l) Saving or attempting to save life at sea;

(m) Reasonable measures to save or attempt to save property at sea;

(n) Reasonable measures to avoid or attempt to avoid damage to the environment; or

(o) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.

4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:

(a) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; or

(b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18.

5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:

(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods; and

(b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) it complied with its obligation to exercise due diligence pursuant to article 14.

6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

Article 18 *Liability of the carrier for other persons*

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

- (a) Any performing party;
- (b) The master or crew of the ship;
- (c) Employees of the carrier or a performing party; or

(d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

Article 19 *Liability of maritime performing parties*

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

Article 20

Joint and several liability

1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention.

2. Without prejudice to article 61, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention.

Article 21

Delay

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed.

Article 22

Calculation of compensation

1. Subject to article 59, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 43.

2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 16.

Article 23

Notice in case of loss, damage or delay

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods.

2. Failure to provide the notice referred to in this article to the carrier or the performing party shall not affect the right to claim compensation for loss of or damage to the goods under this Convention, nor shall it affect the allocation of the burden of proof set out in article 17.

3. The notice referred to in this article is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the person to which they have been delivered and the carrier or the maritime performing party against which liability is being asserted.

4. No compensation in respect of delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.

5. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.

6. In the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and tallying the goods and shall provide access to records and documents relevant to the carriage of the goods.

Chapter 6

Additional provisions relating to particular stages of carriage

Article 24 *Deviation*

When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 61.

Article 25 *Deck cargo on ships*

1. Goods may be carried on the deck of a ship only if:
 - (a) Such carriage is required by law;
 - (b) They are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles; or
 - (c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.
2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (a) or (c) of this article.
3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 17.
4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.

5. If the carrier and shipper expressly agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage, or delay resulted from their carriage on deck.

Article 26

Carriage preceding or subsequent to sea carriage

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

Chapter 7

Obligations of the shipper to the carrier

Article 27

Delivery for carriage

1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.

2. The shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to article 13, paragraph 2.

3. When a container is packed or a vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container or vehicle, and in such a way that they will not cause harm to persons or property.

Article 28

Cooperation of the shipper and the carrier in providing information and instructions

The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.

Article 29

Shipper's obligation to provide information, instructions and documents

1. The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:

(a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and

(b) For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.

2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

Article 30

Basis of shipper's liability to the carrier

1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.

2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 31, paragraph 2, and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34.

3. When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 34.

Article 31

Information for compilation of contract particulars

1. The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 36, paragraph 1; the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any.

2. The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.

Article 32

Special rules on dangerous goods

When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:

(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and

(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.

Article 33
Assumption of shipper's rights and obligations by
the documentary shipper

1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 55, and is entitled to the shipper's rights and defences provided by this chapter and by chapter 13.
2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.

Article 34
Liability of the shipper for other persons

The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.

Chapter 8
Transport documents and electronic transport records

Article 35
Issuance of the transport document or the electronic transport record

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option:

- (a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or
- (b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage or practice of the trade not to use one.

Article 36
Contract particulars

1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:

- (a) A description of the goods as appropriate for the transport;
- (b) The leading marks necessary for identification of the goods;
- (c) The number of packages or pieces, or the quantity of goods; and
- (d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include:

(a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;

(b) The name and address of the carrier;

(c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and

(d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.

3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include:

(a) The name and address of the consignee, if named by the shipper;

(b) The name of a ship, if specified in the contract of carriage;

(c) The place of receipt and, if known to the carrier, the place of delivery;
and

(d) The port of loading and the port of discharge, if specified in the contract of carriage.

4. For the purposes of this article, the phrase “apparent order and condition of the goods” in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:

(a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and

(b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or electronic transport record.

Article 37 *Identity of the carrier*

1. If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.

2. If no person is identified in the contract particulars as the carrier as required pursuant to article 36, subparagraph 2 (b), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.

3. Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.

Article 38 *Signature*

1. A transport document shall be signed by the carrier or a person acting on its behalf.

2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record.

Article 39
Deficiencies in the contract particulars

1. The absence or inaccuracy of one or more of the contract particulars referred to in article 36, paragraphs 1, 2 or 3, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.
2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:
 - (a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or
 - (b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.
3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them.

Article 40
Qualifying the information relating to the goods
in the contract particulars

1. The carrier shall qualify the information referred to in article 36, paragraph 1, to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if:
 - (a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is false or misleading; or
 - (b) The carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading.
2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 36, paragraph 1, in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper.

3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container or vehicle, or when they are delivered in a closed container or vehicle and the carrier or a performing party actually inspects them, the carrier may qualify the information referred to in article 36, paragraph 1, if:

(a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or

(b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.

4. When the goods are delivered for carriage to the carrier or a performing party in a closed container or vehicle, the carrier may qualify the information referred to in:

(a) Article 36, subparagraphs 1 (a), (b), or (c), if:

(i) The goods inside the container or vehicle have not actually been inspected by the carrier or a performing party; and

(ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and

(b) Article 36, subparagraph 1 (d), if:

(i) Neither the carrier nor a performing party weighed the container or vehicle, and the shipper and the carrier had not agreed prior to the shipment that the container or vehicle would be weighed and the weight would be included in the contract particulars; or

(ii) There was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.

Article 41

Evidentiary effect of the contract particulars

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 40:

(a) A transport document or an electronic transport record is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars;

(b) Proof to the contrary by the carrier in respect of any contract particulars shall not be admissible, when such contract particulars are included in:

- (i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith; or
- (ii) A non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith;

(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any of the following contract particulars included in a non-negotiable transport document or a non negotiable electronic transport record:

- (i) The contract particulars referred to in article 36, paragraph 1, when such contract particulars are furnished by the carrier;
- (ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and
- (iii) The contract particulars referred to in article 36, paragraph 2.

Article 42 *“Freight prepaid”*

If the contract particulars contain the statement “freight prepaid” or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

Chapter 9 **Delivery of the goods**

Article 43 *Obligation to accept delivery*

When the goods have arrived at their destination, the consignee that demands delivery of the goods under the contract of carriage shall accept delivery of the goods at the time or within the time period and at the location agreed in the contract of carriage or, failing such agreement, at the time and location at which, having regard to the terms of the contract, the customs, usages or practices of the trade and the circumstances of the carriage, delivery could reasonably be expected.

Article 44
Obligation to acknowledge receipt

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

Article 45
*Delivery when no negotiable transport document or
negotiable electronic transport record is issued*

When neither a negotiable transport document nor a negotiable electronic transport record has been issued:

(a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 43. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier;

(b) If the name and address of the consignee are not referred to in the contract particulars, the controlling party shall prior to or upon the arrival of the goods at the place of destination advise the carrier of such name and address;

(c) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(d) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper pursuant to subparagraph (c) of this article is discharged from its obligations to deliver the goods under the contract of carriage.

Article 46
Delivery when a non-negotiable transport document that
requires surrender is issued

When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The carrier shall deliver the goods at the time and location referred to in article 43 to the consignee upon the consignee properly identifying itself on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to properly identify itself on the request of the carrier, and shall refuse delivery if the non-negotiable document is not surrendered. If more than one original of the non-negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity;

(b) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

Article 47
Delivery when a negotiable transport document or
negotiable electronic transport record is issued

1. When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the

carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 43 to the holder:

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), upon the holder properly identifying itself; or

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;

(b) The carrier shall refuse delivery if the requirements of subparagraph (a) (i) or (a) (ii) of this paragraph are not met;

(c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity. When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, paragraph 1.

2. Without prejudice to article 48, paragraph 1, if the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rules apply:

(a) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (a) (i), or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(b) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (a) of this article is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable

electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

(c) The person giving instructions under subparagraph 2 (a) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph 2 (e) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

(d) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph 2 (b) of this article, but pursuant to contractual or other arrangements made before such delivery acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods;

(e) Notwithstanding subparagraphs 2 (b) and 2 (d) of this article, a holder that becomes a holder after such delivery, and that did not have and could not reasonably have had knowledge of such delivery at the time it became a holder, acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

Article 48 *Goods remaining undelivered*

1. For the purposes of this article, goods shall be deemed to have remained undelivered only if, after their arrival at the place of destination:

(a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 43;

(b) The controlling party, the holder, the shipper or the documentary shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 45, 46 and 47;

(c) The carrier is entitled or required to refuse delivery pursuant to articles 44, 45, 46 and 47;

(d) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested; or

(e) The goods are otherwise undeliverable by the carrier.

2. Without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:

(a) To store the goods at any suitable place;

(b) To unpack the goods if they are packed in containers or vehicles, or to act otherwise in respect of the goods, including by moving them; and

(c) To cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.

3. The carrier may exercise the rights under paragraph 2 of this article only after it has given reasonable notice of the intended action under paragraph 2 of this article to the person stated in the contract particulars as the person, if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.

4. If the goods are sold pursuant to subparagraph 2 (c) of this article, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods.

5. The carrier shall not be liable for loss of or damage to goods that occurs during the time that they remain undelivered pursuant to this article unless the claimant proves that such loss or damage resulted from the failure by the carrier to take steps that would have been reasonable in the circumstances to preserve the goods and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps.

Article 49

Retention of goods

Nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due.

Chapter 10

Rights of the controlling party

Article 50

Exercise and extent of right of control

1. The right of control may be exercised only by the controlling party and is limited to:

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

(b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and

(c) The right to replace the consignee by any other person including the controlling party.

2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

Article 51

Identity of the controlling party and transfer of the right of control

1. Except in the cases referred to in paragraphs 2, 3 and 4 of this article:

(a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;

(b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; and

(c) The controlling party shall properly identify itself when it exercises the right of control.

2. When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document by transferring the

document to that person without endorsement. If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and

(b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party;

(b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

Article 52

Carrier's execution of instructions

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 50 if:

(a) The person giving such instructions is entitled to exercise the right of control;

(b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and

(c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.

2. In any event, the controlling party shall reimburse the carrier for any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.

3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

4. The carrier's liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 17 to 23, and the amount of the compensation payable by the carrier shall be subject to articles 59 to 61.

Article 53 *Deemed delivery*

Goods that are delivered pursuant to an instruction in accordance with article 52, paragraph 1, are deemed to be delivered at the place of destination, and the provisions of chapter 9 relating to such delivery apply to such goods.

Article 54 *Variations to the contract of carriage*

1. The controlling party is the only person that may agree with the carrier to variations to the contract of carriage other than those referred to in article 50, subparagraphs 1 (b) and (c).

2. Variations to the contract of carriage, including those referred to in article 50, subparagraphs 1 (b) and (c), shall be stated in a negotiable transport document or in a non-negotiable transport document that requires surrender,

or incorporated in a negotiable electronic transport record, or, upon the request of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record. If so stated or incorporated, such variations shall be signed in accordance with article 38.

Article 55

Providing additional information, instructions or documents to carrier

1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods not yet provided by the shipper and not otherwise reasonably available to the carrier that the carrier may reasonably need to perform its obligations under the contract of carriage.
2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall provide such information, instructions or documents.

Article 56

Variation by agreement

The parties to the contract of carriage may vary the effect of articles 50, subparagraphs 1 (b) and (c), 50, paragraph 2, and 52. The parties may also restrict or exclude the transferability of the right of control referred to in article 51, subparagraph 1 (b).

Chapter 11

Transfer of rights

Article 57

When a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:
 - (a) Duly endorsed either to such other person or in blank, if an order document; or

(b) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.

2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

Article 58 *Liability of holder*

1. Without prejudice to article 55, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.

2. A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.

3. For the purposes of paragraphs 1 and 2 of this article, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:

(a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or

(b) It transfers its rights pursuant to article 57.

Chapter 12 **Limits of liability**

Article 59 *Limits of liability*

1. Subject to articles 60 and 61, paragraph 1, the carrier's liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever

amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

2. When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.

3. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

Article 60

Limits of liability for loss caused by delay

Subject to article 61, paragraph 2, compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 22 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant to this article and article 59, paragraph 1, may not exceed the limit that would be established pursuant to article 59, paragraph 1, in respect of the total loss of the goods concerned.

Article 61

Loss of the benefit of limitation of liability

1. Neither the carrier nor any of the persons referred to in article 18 is entitled to the benefit of the limitation of liability as provided in article 59, or as provided in the contract of carriage, if the claimant proves that the loss resulting

from the breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

2. Neither the carrier nor any of the persons mentioned in article 18 is entitled to the benefit of the limitation of liability as provided in article 60 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.

Chapter 13

Time for suit

Article 62

Period of time for suit

1. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted after the expiration of a period of two years.
2. The period referred to in paragraph 1 of this article commences on the day on which the carrier has delivered the goods or, in cases in which no goods have been delivered or only part of the goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.
3. Notwithstanding the expiration of the period set out in paragraph 1 of this article, one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party.

Article 63

Extension of time for suit

The period provided in article 62 shall not be subject to suspension or interruption, but the person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

Article 64
Action for indemnity

An action for indemnity by a person held liable may be instituted after the expiration of the period provided in article 62 if the indemnity action is instituted within the later of:

- (a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or
- (b) Ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.

Article 65
Actions against the person identified as the carrier

An action against the bareboat charterer or the person identified as the carrier pursuant to article 37, paragraph 2, may be instituted after the expiration of the period provided in article 62 if the action is instituted within the later of:

- (a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or
- (b) Ninety days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that it is the carrier, pursuant to article 37, paragraph 2.

Chapter 14
Jurisdiction

Article 66
Actions against the carrier

Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 67 or 72, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:

- (a) In a competent court within the jurisdiction of which is situated one of the following places:
 - (i) The domicile of the carrier;
 - (ii) The place of receipt agreed in the contract of carriage;

- (iii) The place of delivery agreed in the contract of carriage; or
- (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or
- (b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

Article 67 *Choice of court agreements*

1. The jurisdiction of a court chosen in accordance with article 66, subparagraph (b), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:

(a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and

(b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.

2. A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if:

(a) The court is in one of the places designated in article 66, subparagraph (a);

(b) That agreement is contained in the transport document or electronic transport record;

(c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and

(d) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.

Article 68 *Actions against the maritime performing party*

The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:

- (a) The domicile of the maritime performing party; or
- (b) The port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods.

Article 69
No additional bases of jurisdiction

Subject to articles 71 and 72, no judicial proceedings under this Convention against the carrier or a maritime performing party may be instituted in a court not designated pursuant to article 66 or 68.

Article 70
Arrest and provisional or protective measures

Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless:

- (a) The requirements of this chapter are fulfilled; or
- (b) An international convention that applies in that State so provides.

Article 71
Consolidation and removal of actions

1. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, the action may be instituted only in a court designated pursuant to both article 66 and article 68. If there is no such court, such action may be instituted in a court designated pursuant to article 68, subparagraph (b), if there is such a court.
2. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, a carrier or a maritime performing party that institutes an action seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum pursuant to article 66 or 68 shall, at the request of the defendant, withdraw that action once the defendant has chosen a court designated pursuant to article 66 or 68, whichever is applicable, where the action may be recommenced.

Article 72
Agreement after a dispute has arisen and jurisdiction when
the defendant has entered an appearance

1. After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.
2. A competent court before which a defendant appears, without contesting jurisdiction in accordance with the rules of that court, has jurisdiction.

Article 73
Recognition and enforcement

1. A decision made in one Contracting State by a court having jurisdiction under this Convention shall be recognized and enforced in another Contracting State in accordance with the law of such latter Contracting State when both States have made a declaration in accordance with article 74.
2. A court may refuse recognition and enforcement based on the grounds for the refusal of recognition and enforcement available pursuant to its law.
3. This chapter shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention, as concerns the recognition or enforcement of judgements as between member States of the regional economic integration organization, whether adopted before or after this Convention.

Article 74
Application of chapter 14

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

Chapter 15
Arbitration

Article 75
Arbitration agreements

1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:

(a) Any place designated for that purpose in the arbitration agreement;
or

(b) Any other place situated in a State where any of the following places is located:

(i) The domicile of the carrier;

(ii) The place of receipt agreed in the contract of carriage;

(iii) The place of delivery agreed in the contract of carriage; or

(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if the agreement is contained in a volume contract that clearly states the names and addresses of the parties and either:

(a) Is individually negotiated; or

(b) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.

4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

(a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article;

(b) The agreement is contained in the transport document or electronic transport record;

(c) The person to be bound is given timely and adequate notice of the place of arbitration; and

(d) Applicable law permits that person to be bound by the arbitration agreement.

5. The provisions of paragraphs 1, 2, 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.

Article 76
Arbitration agreement in non-liner transportation

1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the provisions of this Convention apply by reason of:

(a) The application of article 7; or

(b) The parties' voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention.

2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:

(a) Identifies the parties to and the date of the charter party or other contract excluded from the application of this Convention by reason of the application of article 6; and

(b) Incorporates by specific reference the clause in the charter party or other contract that contains the terms of the arbitration agreement.

Article 77
Agreement to arbitrate after a dispute has arisen

Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen the parties to the dispute may agree to resolve it by arbitration in any place.

Article 78
Application of chapter 15

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

Chapter 16
Validity of contractual terms

Article 79
General provisions

1. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;

(b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or

(c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 18.

2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes, limits or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or

(b) Directly or indirectly excludes, limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.

Article 80 *Special rules for volume contracts*

1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.

2. A derogation pursuant to paragraph 1 of this article is binding only when:

(a) The volume contract contains a prominent statement that it derogates from this Convention;

(b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;

(c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and

(d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.

3. A carrier's public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.

4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 14, subparagraphs (a) and (b), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in article 61.

5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:

(a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and

(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.

6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

Article 81

Special rules for live animals and certain other goods

Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that such loss or damage or such loss due to delay would probably result; or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and that no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

Chapter 17

Matters not governed by this Convention

Article 82

International conventions governing the carriage of goods by other modes of transport

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

(a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;

(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;

(c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or

(d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

Article 83

Global limitation of liability

Nothing in this Convention affects the application of any international convention or national law regulating the global limitation of liability of vessel owners.

Article 84

General average

Nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average.

Article 85
Passengers and luggage

This Convention does not apply to a contract of carriage for passengers and their luggage.

Article 86
Damage caused by nuclear incident

No liability arises under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the Additional Protocol of 28 January 1964 and by the Protocols of 16 November 1982 and 12 February 2004, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988 and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, including any amendment to these conventions and any future convention in respect of the liability of the operator of a nuclear installation for damage caused by a nuclear incident; or

(b) Under national law applicable to the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.

Chapter 18
Final clauses

Article 87
Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 88
Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States at Rotterdam, the Netherlands, on 23 September 2009, and thereafter at the Headquarters of the United Nations in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 89 *Denunciation of other conventions*

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the International Convention for the Unification of certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924, to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading, signed at Brussels on 23 February 1968, or to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979, shall at the same time denounce that Convention and the protocol or protocols thereto to which it is a party by notifying the Government of Belgium to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.
2. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978 shall at the same time denounce that Convention by notifying the Secretary-General of the United Nations to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.
3. For the purposes of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraphs 1 and 2 of this article that are notified to the depositary after this Convention has entered into force are not effective until such denunciations as may be required on the part of those States in respect of these instruments have become effective. The depositary of this Convention shall consult with the Government of Belgium, as the depositary of the instruments referred to in paragraph 1 of this article, so as to ensure necessary coordination in this respect.

Article 90
Reservations

No reservation is permitted to this Convention.

Article 91
Procedure and effect of declarations

1. The declarations permitted by articles 74 and 78 may be made at any time. The initial declarations permitted by article 92, paragraph 1, and article 93, paragraph 2, shall be made at the time of signature, ratification, acceptance, approval or accession. No other declaration is permitted under this Convention.
2. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.
3. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.
4. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.
5. Any State that makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal of a declaration, or its modification where permitted by this Convention, takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article 92
Effect in domestic territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. When a Contracting State has declared pursuant to this article that this Convention extends to one or more but not all of its territorial units, a place located in a territorial unit to which this Convention does not extend is not considered to be in a Contracting State for the purposes of this Convention.
4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 93

Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. When the number of Contracting States is relevant in this Convention, the regional economic integration organization does not count as a Contracting State in addition to its member States which are Contracting States.
2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.
3. Any reference to a “Contracting State” or “Contracting States” in this Convention applies equally to a regional economic integration organization when the context so requires.

Article 94

Entry into force

1. This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.
2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the twentieth instrument of ratification, acceptance,

approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State.

Article 95 *Revision and amendment*

1. At the request of not less than one third of the Contracting States to this Convention, the Secretary-General of the United Nations shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Article 96 *Denunciation of this Convention*

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at New York, this eleventh day of December two thousand and eight, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

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CEVNI (European Code for Inland Waterways)

CMA / CGM Bill of Lading

Council Directive 96/98/EC on Marine Equipment ('the Marine Equipment Directive'), (as amended by Commission Directive 98/85/EC)

Evergreen Bill of Lading

Hong Kong Ordinance No. 104 of 1994

ICC Uniform Rules for a combined Transport Document 1975 (based on the TCM Draft Convention 1975, UN Doc TRANS/370 CTCIII/1, Annex I)

Maersk Line Multimodal Transport Bill of Lading

Marine Shipping Notices (MSN) 1751

Merchant Shipping (Marine Equipment) Regulations 1999 (SI 1999/1957)

MOPOG (the Russian domestic regulations for carrying dangerous container)

MS (Safe Manning, Hours of Work and Watchkeeping) Regulations 1997 (SI 1997/1320)

UNCTAD ICC Rules for Multimodal Transport Documents 1992 (based in part on International Multimodal Transport Convention 1980, UN Doc TD/MT/CONF/16, not in force)

UNCTAD Secretariat Implementation of Multimodal Transport Rules

UPC Ocean Freight Service Multimodal transport or port to port shipment condition

ONLINE RESOURCES:

[http://www.bing.com/news/search?q=Samantha+Mumba+is+engaged&FORM=MSNTM3&mkt=en-gb&ocid=today\)](http://www.bing.com/news/search?q=Samantha+Mumba+is+engaged&FORM=MSNTM3&mkt=en-gb&ocid=today)

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PUBLICATIONS

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Effect of shipping standards on the charterparty obligation of seaworthiness; the example of SOLAS

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Introduction

Laws relating to the Carriage of Goods by Sea have emerged from policies of customs of practice, precedents and ships' operators. For example, the Hague/Hague-Visby Rules and Hamburg Rules¹ were contrived from the common law to properly regulate the commercial interests of a contract at the relevant time. Law is changeable, which means that it can be reformed according to the development of the shipping industry. This development results from the practice of good seamanship, quality customs, scientific researches, and so on,² which make a major involvement in setting the shipping sector to form codification in regulations, codes, conventions and so on, whereby constituting the standard of the shipping industry. This is the standard that courts take into consideration in deciding their cases³ and the benchmark for measuring and distinguishing prudent and diligent shipowners from negligent ones who do not perform their obligations prudently and diligently when they exercise their obligations, i.e. in providing a seaworthy vessel.

It is known that there is no formal obligation for the decision-maker to accept such standards. For example, despite what has been said above that the law is a dynamic, international

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¹ Before that, there was the Harter Act.

² Numerous groups and associations (of non-governmental origination) have contributed to the process of developing safety regulations, such as: shipbuilders and equipment manufacturers; shipping companies including shipowners, charterers, fleet operators and managers; seafarers; shippers and cargo owners; insurers; classification societies and standard-setting bodies; port authorities; and navigational aid services. The rise in marine incidents led to extensive research funded by governments: The UK Department of Transport, in 1988, funded research carried out by the Tavistock Institution. This research resulted in the report *The Human Element in Shipping Casualties 2* (HMSO, London, 1988) ISBN 0 11 551004 4. This report was then taken to the IMO. In 1992, the House of Lords Select Committee on Science and Technology, chaired by Lord Carver, issued a report on the *Safety Aspects of Ship Design and Technology* House of Lords Session 1991-92, HL Paper 30-II and HL Paper 75.

³ The shipping industry's conventions, codes, regulations, and so on are the standards which create the force behind nearly all the technical standards and legal rules for safety at sea and prevention of accidents, pollution, loss of life and cargo at sea. See P. Boisson *Safety at Sea* (Bureau Veritas, 1999), 137.

convention, i.e. Hague/Hague-Visby Rules, they do not usually maintain all of the recent developments of the industry; for example, the emergence of new regulations or recommendations which would influence directly or indirectly the carrier's⁴ obligations to provide a seaworthy vessel if they did not comply. The need to adopt new standards to cope with the thrust of new technologies and developments applying to vessels and their equipment has caused the shipping industry to experience numerous developments, starting with the Safety of Life at Sea (SOLAS) Convention and the Convention on Standard of Training, Certification and Watchkeeping for Seafarers (STCW Convention). And as part of the solution to keep abreast of new development, such development must be taken into consideration, i.e. standard form charterparties.

This article sheds light, in general, on these conventions as well as their problems which affect the obligation of seaworthiness. It is therefore essential to deal with the current Carriage of Goods by Sea law (under common and Hague/Hague-Visby Rules) which is of crucial importance to the industry's standards, and that may influence a carrier in complying with the obligation of seaworthiness.

The objective concept of seaworthiness in statutory regulations and charterparty

Shipowners⁵ have to comply with a number of requirements required by the charterparties. These obligations, ordinarily, are set out in the statutory regulations and often are mentioned in the contract of carriage, in general terms, and in standard form charterparty.⁶

(a) Statutory regulations

The Hague/Hague-Visby Rules bind the carrier before and at the beginning of the voyage to exercise due diligence to:⁷ (a) make the ship seaworthy;⁸ (b) properly man,⁹ equip¹⁰ and supply the ship,¹¹ and to encounter the contemplated perils of the voyage.

⁴ This word is used for the entire paper referring to shipowners or demise charterer.

⁵ The term shipowner is used throughout this paper in its widest meaning. This includes the bareboat charter and ship manager; in other words, is the sea carrier excluding the time or voyage charterer.

⁶ Although the word 'seaworthiness' may well not be present. (see i.e. *Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q. B. 26; [1961] 2 Lloyd's Rep. 478), for instance the New York Product Exchange form 1946, lines 21-24, expressly provides that on her delivery, the ship shall be 'ready to receive cargo with clean swept holds and tight, staunch, strong and in every way fitted for the service...with a full complement of officers, seamen, engineers and firemen - for a vessel of her tonnage.' See also NYPE 1993 cl.6.

⁷ Article III r.1.

⁸ *The Toledo* [1995] 1 Lloyd's Rep. 40: damaged plating and deformation of the bracket rendered the vessel unseaworthy; *Southern Sugar & Molasses Co Insurance v Artemis Maritime Co Insurance* [1950] AMC 2054: loose rivets rendered the vessel unseaworthy; *Huilever SA v The Otho* [1943] AMC 210: a crack in one of the ship's hull plates rendered the vessel unseaworthy.

⁹ *The Roberta* (1938) 60 Ll Rep. 84: the court held the ship to be unseaworthy because the shipowners employed an engineer who proved to be incompetent. *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719:

(b) Charterparty

The vessel and her equipment must be reasonably fit to withstand the perils which may foreseeably be encountered on the voyage and also fit to keep the contracted cargo. This approach is taken in both voyage and time charter. This is often mentioned in general terms in standard form charterparty. Alternatively, the word 'seaworthiness' may well not be present;¹² for instance, the New York Product Exchange form 1946, lines 21-24,¹³ whereas, some forms are requesting further details in additional typed clauses.¹⁴ Other forms may impose a continuing obligation to maintain the vessel and a clause paramount which incorporates the Hague/Hague-Visby Rules; similarly the US COGSA.¹⁵ If no mention is included in the charterparty, the seaworthiness will be implied on the basis of the term from the English law or on the basis of legislation in the Scandinavian countries.

The impact of the industry on the standards of seaworthiness

The drafting of the statutory regimes, such as the Hague/Hague-Visby Rules, is a codification of old laws, precedents and customised conditions, which were gathered in one set of rules to meet the standards of the industry. This shows that when drafting such rules, they are reflecting the industry at the time of their codification. Therefore, with the improvement of sea carriage and the development of the industry, it emerges that the legal question which determined the required level of seaworthiness has

the master's ignorance of fire hazards, supervising stevedores and particular characteristics of the fire fighting on the ship constituted incompetence consequently rendering the vessel unseaworthy due to improper manning.

⁹ *Project Asia Line Inc v Shone (The Pride of Donegal)* [2002] 1 Lloyd's Rep. 659: defects in the generators which amounted to a real risk that the ship might have been left without power during the course of voyage rendered the vessel unseaworthy; *Haracopos v Mountain* (1934) 49 Ll. L. Rep. 267: a defect in the steering gear rendered the vessel unseaworthy.

¹⁰ *Project Asia Line Inc v Shone (The Pride of Donegal)* [2002] 1 Lloyd's Rep. 659: defects in the generators which amounted to a real risk that the ship might have been left without power during the course of voyage rendered the vessel unseaworthy; *Haracopos v Mountain* (1934) 49 Ll. L. Rep. 267: a defect in the steering gear rendered the vessel unseaworthy.

¹¹ *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep. 177: there was a breach of the exercise of due diligence in providing inadequate bunker at the commencement of the voyage which rendered the tug unseaworthy; however, the defendants were protected from liability by an exemption clause; *Owners of Cargo Lately Laden on Board the Makedonia v Owners of the Makedonia (The Makedonia)* [1962] 1 Lloyd's Rep. 316: contaminated bunker fuel rendered the vessel unseaworthy.

¹² See i.e. *Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q. B. 26; [1961] 2 Lloyd's Rep. 478.

¹³ It expressly provides that on her delivery, the ship shall be 'ready to receive cargo with clean swept holds and tight, staunch, strong and in every way fitted for the service...with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage.' See also NYPE 1993 cl.6.

¹⁴ See, i.e. NYPE 1993 cl.6.

¹⁵ See, i.e. NYPE 1993 cl.31. in such a case, if the Hague/Hague-Visby Rules are incorporated into a charterparty and if they provide an absolute obligation of seaworthiness, the obligation thus will be reduced to one to exercise due diligence to provide a seaworthy vessel. See *Time charters*, para. 34.5.

possibly reformed over time and will continue to change with the trends of the shipping industry.¹⁶

It was noted that ‘the concept of seaworthiness both in contracts for the carriage of goods by sea and in chartering contracts includes evaluations by the shipping community as a whole.’¹⁷ Therefore, seaworthiness, which might be in the form of an international convention or standard form charterparty, is judged by the standards and the practices of the industry.¹⁸

However, these same international requirements include the origin of the industry itself. Cresswell J. in *The Lendoudis Evangelos II*¹⁹ affirmed the words of Lord Sumner that ‘[s]eaworthiness must be judged by the standards and practices of the industry at the relevant time, at least so long as those standards and practices are reasonable.’²⁰

These aspects of the industry’s standards are a yardstick for measuring and distinguishing good shipowners from those who do not comply with these standards, breaches of which might cause the unseaworthiness of their vessels.²¹

It was mentioned above that there are vast numbers of regulations governing the industry’s standards and it would be impossible to cover every one of them in this study.²² Despite that, there are several numbers of regulations relating to the industry’s standard. However, this paper will cover the international public standards of the industry which have a direct impact on obligation of seaworthiness. These particular standards of the industry, which govern the seaworthiness of vessels, are regulated primarily by IMO conventions, namely:²³

¹⁶ Lord Sumner – *Bradley & Sons Ltd v Federal Steam Navigation Co.* (1926) 24 Ll. L. Rep. 446 (1927) 27 Ll. L. Rep. 395 as per Lord Sumner. Lord Sumner in a case prior to the emergence of the Hague-Visby Rules describes the situation: ‘In the law of Carriage of Goods by Sea, neither seaworthiness nor due diligence is absolute, both are relative among other things to the state of knowledge and the standards of [industry] prevailing at the time.’

¹⁷ Hannu Honka, ‘The Standard of the Vessel and the ISM Code’, cited as Chapter 4 in Johan Schelin, *Modern Law of Charterparties* (Axel Ax:son Johnson Institute of Maritime and Transport Law, University of Stockholm, 2003), at p.114.

¹⁸ Cooke, J., Young, T., Kimball, J., Lambert, L. & Martowski, D. *Voyage Charter* (3rd edn, 2007), Chapter 11, para. 11,19.

¹⁹ *The Lendoudis Evangelos II* [2001] 2 Lloyd’s Rep. 304, at p. 306.

²⁰ This exact approach is followed by the same judge in the *Papera Trades Co Ltd and Others v Hyundai Merchant Co. Ltd and Another (The Eurasian Dream)* [2002] 1 Lloyd’s Rep. 719 at para. 127.

²¹ Talal Aladwani, ‘The supply of containers and “seaworthiness”-The Rotterdam Rules perspective’, *Journal of Maritime Law & Commerce* 42:2 (2011), p.185-209, at p. 194.

²² Although other regulations contribute to the industry’s standards, such as the Classification Society, they generally exclude the ship’s operational standards (i.e. manning, crew qualification, equipment management and lifesaving appliances such as lifeboats, life rafts and lifejackets), navigational aids (onboard equipment and navigational equipment such as radar, electronic charts and Gyro).

²³ Susan Hodges has affirmed that safety of ships relates to seaworthiness, although it has a specific and precise meaning under the maritime law. Still, this particular aspect of safety is regulated primarily by IMO conventions, namely: SOLAS 1974, Load Lines Conventions 1966 and STCW 1978.

- International Convention on Safety of Life at Sea (SOLAS), 1974²⁴

These industry regulations are determining the level of adequacy that the vessel's structure and cargo holds must be designed thereof; also, they are necessary to define the required reliability of its machinery and equipment, which reflect the shape of the minimum standard of seaworthiness.

This means that the required standard of care or due diligence set by law might be assessed by the reference to the standards of the industry that reasonable prudent shipowners would require such a standard to his vessel.²⁵ For instance, when science produces new means or improvements to ensure safety at sea, their purpose is to develop the industry's standard,²⁶ for example, if international conventions require the vessel to be modified, the absence of them might render the vessel unseaworthy, even in the case that their usage has not become common practice.²⁷ Non-compliance with these new means (regulations) might constitute the vessel unseaworthy in two ways: On the one hand, at least for UK vessels, if a vessel is not carrying certificates such as Load Lines²⁸ or a radio equipment²⁹ certificate then that declares that the vessel, among other matters, does not comply with the international regulations, so therefore the vessel will be unseaworthy.³⁰ On the other hand, if the vessel's construction does not comply with the industry's standards, for example SOLAS, then the vessel will be rendered unseaworthy.³¹

Therefore, considering the purpose of the SOLAS Convention which is a part of the shipping industry, 'to specify minimum standards for the construction, equipment and operation of ships,

²⁴ For example, certificates required by SOLAS are to be issued by the flag administrations including international tonnage certificate, passenger ship safety certificate, cargo ship safety certificate and load line certificates.

²⁵ In due diligence case the judge in *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002] EWHC 118, at p. 127 case said that '...seaworthiness must be judged by the standards and practice of the industry at the relevant time at least, so long as those standards are practical and reasonable...' per Cresswell Judge; see *The Subro Valour* [1995] 1 Lloyd's Rep. 509 at p.516; also the same point in *The Kapitan Sakhrov* [2000] C.L.C. 933, Auld LJ stated: '...the test to be objective, namely to be measured by the standards of a reasonable shipowner, taking into account international standards and the particular circumstances of the problem in hand,' at p.947.

²⁶ The common law implied undertaking requires that the vessel be a seaworthy vessel. There is no implied undertaking that the vessel be a 'safe ship' in UK law, though this is probably is in the USA for American cases; see *Hutton v Royal Exchange Assurance* [1971] N.Z.L.R. 1045 Sc.; *The Fiona* [1994] 2 Lloyd's Rep, 506; *Woolf v Clagget* [1800] 170 E.R. 607.

²⁷ As far as British vessels are concerned

²⁸ Schedule 3 of the MSA 1995, this schedule gives effect to the international convention on load lines signed in London on 5 April 1966.

²⁹ These rules were adopted into English law by the Merchant Shipping (Safety of Navigation) regulations 2002 SI 2002/1473, as amended by SI 2004/2110.

³⁰ See *Cheikh Boutros v Ceylon Shipping Lines (The Madeleine)* [1967] 2 Lloyd's Rep. 224 where the documentation for the voyage was inadequate and this was held to render the vessel unseaworthy.

³¹ See *The Miss Jay Jay* [1987] 1 Lloyd's Rep. 32 (C.A.), a design error; namely, using materials during design which were quite unsuitable for the purpose of navigation was held to render the vessel unseaworthy.

compatible with their safety,³² the industry's standard of conduct is mandatory by virtue of SOLAS.

SOLAS³³

The SOLAS Convention sets some rules for the minimum standards for safe construction of vessels and the basic safety equipment necessary to be on board. The Safety Convention, such as SOLAS, has an influence on the objective seaworthiness³⁴ concept in chartering.³⁵ The obligation of seaworthiness³⁶ imposes on the carrier a duty to carry out all reasonable measures in the light of the standards in the industry for the purpose of providing a seaworthy vessel and to ensure the safe state of the vessel.³⁷ SOLAS regulates these minimum standards for the construction of the vessels and her cargo holds.³⁸ Materials used should have a particular standard and construction. It should also be designed in such a way to withstand the perils of the sea and the weight of the cargo so as to protect the lives of personnel and the cargo from damage and/or loss.³⁹ As regards to the equipment of the vessel, they should be of an approved

³² The International Safety Organisation. Available: http://www.imo.org/conventions/contents.asp?Topic_id=257&doc_id=647.

³³ The generally accepted international regulations, procedures and practices governing ship construction, equipment and seaworthiness which are required by Article 94 and other provisions of UNCLOS to observe are basically those contained in SOLAS, Load Lines Convention and MARPOL.

³⁴ But only to the extent that safety rules and regulations intended to prove safety and protect the ship and cargo on board.

³⁵ Hannu Honka, 'The standard of the vessel and the ISM Code cited as Chapter 4 in Johan Schelin, *Modern Law of Charterparties* (Axel Ax:son Johnson Institute of Maritime and Transport Law, University of Stockholm, 2003), at p.114.

³⁶ Whether implied seaworthiness by the common law or expressed by the carriage conventions, i.e. Hague/Hague-Visby Rules or Hamburg Rules, or by the standard form charterparties.

³⁷ Under the revision introduced by the Merchant Shipping Act 1974, there was a change of terminology from an unseaworthy ship as in the old s457 M.S.A. 1894 to a 'dangerously unsafe ship' under s44 M.S.A. 1988 in respect of a vessel 'unfit to go to sea'. This certainly seems to return it closer to the concept of seaworthiness than ambiguous term 'unsafe' which fails to specify safety regarding the ability to go to sea and safety for the crew, vessels and cargoes. The most recent section of M.S.A. 1995 has altered all the above section numbers.

³⁸ See *The Princess Victoria* [1953] 2 Lloyd's 619. Inadequacy in the stern doors were of a poor design. The vessel was not capable of coping with the ordinary perils of the sea and sank in the Irish Sea. The court of appeal upheld the lower court that the vessel was unseaworthy due to the inadequate construction of the stern doors which made her unable to cope with the peril of the sea, per Lord MacDermott, CJ. Also see *The Marine Sulphur Queen* [1973] 1 Lloyd's 88. The court held that the vessel breached building regulations and was therefore unseaworthy. It is important to say that the construction regulations of merchant vessels are extracted from the regulations of SOLAS, Load Lines and classifications society of the vessel; see also *Leonard v Leland* (1902) 18 T.L.R. 727. During lifeboat drill, a hook fell off and a davit broke. The plaintiff, the lifeboat and the hook fell into the water. The jury, due to a defective hook and davit of the lifeboat, has ruled for the plaintiff. The lifeboats, their hooks and davits are regulated nowadays by SOLAS regulation, Chapter III regulation 19-20.

³⁹ See *The Princess Victoria* [1953] 2 Lloyd's 619: inadequacy in the stern doors were of a poor design. The vessel was not capable of coping with the ordinary perils of the sea and sank in the Irish Sea. The Court of Appeal upheld the lower court's decision that the vessel was unseaworthy due to the inadequate construction of the stern doors which made her unable to cope with the perils of the sea, per Lord MacDermott, C.J. See also *The Marine Sulphur Queen* [1973] 1 Lloyd's 88. The court held that the vessel breached building regulations and was therefore unseaworthy. It is important to state that the construction

type of machinery with enough spares on board in case of failure; for example, navigational equipment, there should be a spare or stand-by equipment ready to be used at all times. This indeed includes the electric insulations. Vessels should be fitted with adequate means of fire detection and protection along with different means of extinguishers to fight fire.⁴⁰ Life-saving appliances should be adequate to ensure that the crew are prepared to save their life and others in case of emergency.

SOLAS also contributes to preventing pollution of the environment. If its provisions are not properly observed, this might equally constitute a lack of due diligence.⁴¹

This again makes no difference when comparing SOLAS with the duty to exercise due diligence, which is the effort of a competent and reasonable carrier or any person working for him to provide a safe and seaworthy vessel to fulfil the requirements set out in Article III r.1.⁴²

Due diligence obliges the shipowner to carry out all reasonable measures in the light of the standards of the industry for the purpose of providing a seaworthy vessel and to ensure the safe state of the vessel.⁴³ In this manner, the safety of shipping is, at present, governed principally by the international industry standards, i.e. conventions and regulations. SOLAS is therefore one of those standards.⁴⁴ However, is SOLAS, being a standard bearer of the industry, adequate enough to govern the major part of aspects of seaworthiness?

regulations of merchant vessels are extracted from the regulations of SOLAS, Load Lines and classifications society of the vessel.

⁴⁰ This proposition is discussed below by the examples of *Papera Trades Co Ltd and Others v Hyundai Merchant Co. Ltd and Another (The Eurasian Dream)* [2002] 1 Lloyd's Rep. 719, as per Creswell J.; also see *The Star Sea* [1995] 1 Lloyd's Rep. 651. (When the fire broke out in the engine room, the master did not know how to operate the CO₂ system to fight the fire. Tuckey J. held that the vessel was unseaworthy due to an incompetent master).

⁴¹ Both Safety of Life at Sea and the Load Line Conventions deal with safety and seaworthiness of the vessel; see Carbett H. Spurin *The Law of International Trade and Carriage* Chapter 9, at p. 33. Available: electronic book cited in The National Academy for Dispute Resolution website: <www.nadr.co.uk/articles/articles.php?category=4>. The same point was raised by Philippe Boisson *Safety at Sea: Policies, Regulations & International Law* (Bureau Veritas, 1999), 197.

⁴² W. Tetley, *Marine Cargo Claims* 4th edn. (Éditions Yvon Blais, 2008), Chapter 15, p. 876. He defines due diligence as 'genuine, competent and reasonable effort of the carrier to fulfil the obligations set out in subparagraph (a), (b) and (c) of Article III (1) of the Hague/Hague-Visby Rules.' See also, N. J. Margetson, *The System of Liability of Articles III and IV of the Hague (Visby) Rules* (Zutphen: Uitgeverij Paris 2008).

⁴³ Under the revision introduced by the Merchant Shipping Act 1974, there was a change of terminology from an unseaworthy ship as in the old s.457 M.S.A. 1894 to a 'dangerously unsafe ship' under s.44 M.S.A. 1988 in respect of a vessel 'unfit to go to sea'. This certainly seems to revert more closely to the concept of seaworthiness than ambiguous term 'unsafe', which fails to specify safety regarding the ability to go to sea and safety for the crew, vessels and cargoes. The most recent section of M.S.A. 1995 has altered all the above section numbers.

⁴⁴ W. Tetley, *Marine Cargo Claims* 4th edn. (Éditions Yvon Blais, 2008), Chapter 15, p. 876. He defines due diligence as 'genuine, competent and reasonable effort of the carrier to fulfil the obligations set out in subparagraph (a), (b) and (c) of Article III (1) of the Hague/Hague-Visby Rules.' See also, N. J. Margetson, *The System of Liability of Articles III and IV of the Hague (Visby) Rules* (Zutphen: Uitgeverij Paris 2008).

The effect of SOLAS' deficiency on seaworthiness

A carrier has equipped his vessel according to SOLAS, but due to the deficiency of SOLAS, the vessel is still regarded as unseaworthy despite the fact that such unseaworthiness is not a lack of the carrier's action to provide a seaworthy vessel, but merely due to the inadequacy of regulations. Case law illustrates the point.

For instance, in *The Eurasian Dream* case, the standard of the industry set by the SOLAS Convention was clearly questioned. In *The Eurasian Dream*, the court criticised the safety standards of the vessel, in particular the inadequacy of her safety equipment. SOLAS had set out the required amount of safety equipment to be placed onboard. A fire broke out causing the vessel and its cargo to be a totally lost. The court held that, *inter alia*, the vessel was unseaworthy for not being fitted with the adequate number of walkie-talkies as part of its safety equipment, which would have assisted the crew to communicate with each other in case of an emergency.⁴⁵ Despite the owner of the *Eurasian Dream* having complied with the standards of SOLAS by providing the exact number of walkie-talkies required, the court nevertheless found that the owner had breached the obligation to exercise due diligence in providing an adequate number of walkie-talkies. The vessel, therefore, was unseaworthy.

Even with the aid of the International Safety Management System (ISM) Code,⁴⁶ such problems might not have been discovered and would contradict the statement that ISM 'is a system used daily which is actually growing and developing through a process of continual improvement.'⁴⁷

Compliance with the SOLAS Convention does not guarantee the seaworthiness of a vessel in all respects because the compliance with the shipping industry's conventions, such as SOLAS, does not have the same value in international law. For instance, the direct effect of the incompliance with the regulations of the industry by the shipowner may be prone to the vessel being refused to commence her voyage from the port in question by denial to provide the vessel with clearance certifications and documents, or due to incompliance of such regulations including the shipowner incurring a fine or being refused entry to the port of destination. The consequences of

⁴⁵ Another example of SOLAS deficiency. For instance, SOLAS required a chart as a replacement of the regular paper chart. The same regulator might not have adequate or clear directions on the use of the new equipment. Eventually, it will result in a response by another regulator to produce guidelines promoting safe use of such equipment.

⁴⁶ Hannu Honka, 'The Standard of the Vessel and the ISM Code' cited in Johan Schelin (ed) *Modern Law of Charterparties* (Jure AB, 2003). It was noted that some ISM Clauses, such as the BIMCO Standard ISM Clause: 'seems to leave room for uncertainties. In any case, it is clear that the owner will not be liable on the basis of this clause, unless there is a causal link between the breach of the clause and the damage, expenses and delay.' at p.112.

⁴⁷ Philip Anderson *ISM Code: A Practical Guide to the Legal Insurance Implications* (2nd edn, 2005), Chapter 1, para, 1.1.

incompliance/compliance with such regulations are not clear whether it amounts to a breach of seaworthiness or not. Subsequently, it may affect their legal bearing and the practical effectiveness on the obligation of due diligence to provide a seaworthy vessel. In other words, the shipowner on one hand will be reluctant to comply with such regulations if it is not enforced under the flag of the vessel or included in the terms of the particular contract. On the other hand, the judgement by the port state in regard to whether the vessel is unseaworthy/seaworthy, due to incompliance with SOLAS regulations, will be determined by the notion of the port inspector when having in mind that the SOLAS Convention is not a decisive evidence of seaworthiness. The judgment of such inspector,⁴⁸ indeed, will be affected on the way that such a flag state implements SOLAS to its law.⁴⁹

For example, the English court in *The Eurasian Dream* held that the SOLAS Convention was not a decisive evidence of seaworthiness. When the fire started, the ship was offloading a cargo of cars in Sharjah. The crew were not able to contain the fire and as a result the vessel was abandoned and towed away from her berth. She was eventually lost. The cargo owners claimed for the cargo damage arguing that the vessel was unseaworthy. The court held that the vessel was unseaworthy, *inter alia*, due to the inadequacy of its safety equipment; *The Eurasian Dream* needed more walkie-talkies for communication and more sets of breathing apparatus to fight the fire, despite the fact that *she* had complied with the SOLAS Convention by possessing the required amount of safety equipment, i.e. walkie-talkies and fire-fighting equipment at the time of the incident.

What can a shipowner do to overcome the inefficiencies of SOLAS?

The judge in the *Eurasian Dream* case alluded to the point that the shipowner had exercised the required standard of due diligence to provide a seaworthy vessel and to identify the 'risk' of unseaworthiness to 'establish safeguards' to avoid loss or damage from that unseaworthiness. Mere compliance with the one of the industry's standards, i.e. the SOLAS Convention, is not conclusive as having exercised due diligence by the carrier, nor is it sufficient for the vessel's physical seaworthiness. However, that suggests the following: the carrier needs to determine his vessel's seaworthiness by assessing the standard of seaworthiness, not merely at the outset of the voyage, i.e. before and at the beginning of the voyage, but at all times and not merely relying on meeting the industry regulations or recommendations, such as SOLAS. He should draw on the inherent specialised knowledge that he possesses or ought to possess regarding the

⁴⁸ This, in turn, might result in a dispute as to whether the refusal or delay of the vessel caused the failure of the carrier to exercise due diligence to provide a seaworthy vessel.

⁴⁹ See Baris Soyer and Richard Williams (2005) *Potential legal ramifications of the International Ship and Port Facility Security (ISPS) Code on Maritime Law* LMCQL 515. at 525.

fitness of his vessel and by so doing⁵⁰ will know the standard of care necessary to fulfil the obligation of seaworthiness. The point that ‘the standard of seaworthiness must rise with improved knowledge of shipbuilding and navigation’⁵¹ is not fully embraced by SOLAS. That is to say, relying exclusively on the regulations of the shipping standards (such as SOLAS) to determine the satisfactory standard of seaworthiness is an erroneous approach.⁵² Those regulations, especially technical ones such as involving fire and safety equipment,⁵³ mostly evolve from reactions⁵⁴ to maritime incidents and are therefore the initiator or amendments to the regulation. As a result, the adherence to them by the carrier will not satisfy the obligation of seaworthiness.

What can be done to improve the current situation and reduce malpractice regarding shipping standards?

Maintaining the standard of shipping by the use of particular standard forms

Since the introduction of the Hague/Hague-Visby Rules, there have been tremendous technological developments with regard to electronic aids and navigation. New methods of performing contracts of carriage have become possible. Thus, ‘the standard of due diligence [to provide a seaworthy vessel] required from the carrier gets higher and higher everyday’.⁵⁵ It is

⁵⁰ Knowledge is known exclusively to the carrier/shipowner, such as the stability of the vessel. See *Onega Shipping & Chartering BV v JSC Arcadia Shipping (The SOCOL 3)* [2010] EWHC 777. The improper stowage of cargo had affected the vessel’s overall stability on departure from the last loaded port in Finland. This was an aspect that only the chief officer and master would have known about, not the charterers. The Judge, Mr Justice Hamblen, found that there had been a failure on the part of the master and chief officer to supervise the cargo stowage properly with the ship’s stability and ultimate seaworthiness in mind. See also Donaghy, T. ‘There goes the deck cargo’, *Maritime Risk International* (12 Nov. 2010).

⁵¹ *Burges v Wickam* (1863) 3 B. & S. 669, at p.693, per Blackburn J.

⁵² It is important to note that the private sector plays an important role nowadays in the enhancement of the safety and seaworthiness of vessels. The International Chamber of Shipping, for example, issues recommendations to reinforce precautionary measures during loading or discharging operations. See *Long Campaign* Lloyd’s List, 7 Sept., 1995; the international Cargo Handling Coordination Association (ICHCA), to ensure proper performance of operations. See ‘Pressure grows for action on overloading/discharging practices’ *International Bulk Journal* Dec. 1994, 99-101; Insurers also have large contributions to enhance the proper practice that failed to reflect due diligence or due care. See for example *Figures hide why bulk carrier sinkings are still a problem* Lloyd’s List, 14 Aug. 1992.

⁵³ Horrocks, C. *Challenges Facing the Shipping Industry in the 21st Century* Sixth Annual Cadwallader Memorial Lecture (15 Sep. 2003) at p. 3.

⁵⁴ For example, the origin of the ISM Code was as a reaction from representatives of the UK during the 15th session of the IMO in November 1987. They requested that the IMO immediately investigate designs to improve the safety of roll-on/roll-off ferries. The Secretary of the General International Chamber of Shipping said: ‘It is often said that advances in the technical regulation of shipping tend to follow a casualty - that the maritime sector responds to, rather than anticipates its problems.’ Horrocks, C. *Challenges Facing the Shipping Industry in the 21st Century* Sixth Annual Cadwallader Memorial Lecture (15 Sep. 2003) at pp. 3-4.

⁵⁵ Hakan Karan (2005) *The Carrier’s Liability under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (Edwin Mellen Press) 282.

debatable whether seaworthiness requires the shipowner of an older vessel to upgrade its machinery and equipment in order to satisfy the existing standards of seaworthiness. A shipowner cannot be expected to constantly keep up with all the latest expensive advanced technology. However, the shipowner is to some extent required to furnish his vessel with some recent developments in the industry. The requirement of a 'reasonable shipowner' in preparing or providing a seaworthy vessel is determined objectively to change over time⁵⁶ and with technological developments.⁵⁷ Further, it was argued that the shipowner is obliged to implement such new technology that will affect the seaworthiness of the vessel, if it is directly related to the shipping industry as is the case with the International Safety Management System (ISM) Code⁵⁸ which has become mandatory.⁵⁹ Ignorance of the provisions of the International Maritime Organisation (ISM, SOLAS, MARPOL and so on) may point to the violation of seaworthiness duty on the part of the shipowner in connection with safe operation of his vessel.⁶⁰ That said, there has been judicial reluctance to include the development of machinery and equipment of the industry as part of the shipowner's duty to provide a seaworthy vessel,⁶¹ provided that those technological advances are not yet standard for a particular carriage.

Nonetheless, an obligation in the current law on the part of the shipowner to provide a seaworthy vessel accompanied by a clause similar to Clause 52 of the Shelltime charterparty⁶² would put the shipowner at risk of breach of due diligence (to provide a seaworthy vessel) as it puts a burden on him to exercise all the practicable precautions, i.e. modify or fit new equipment according to the shipping industry in order to bring it in line with the recently developed standards of the industry. For example, *The Elli* and *The Frixos*,⁶³ although a recent case concerning not only SOLAS but also MARPOL. However, it illustrates the fact that a shipowner must modernise to meet the latest amendments of the standards of the industry. The owner of the two oil tankers, *The Elli* and *The Frixos*, time-chartered the vessels on a Shelltime 4 form. The tankers were described as 'double-sided'. After approximately 20 months, and before the

⁵⁶ Sze Ping-fat, *Carrier's Liability under the Hague, Hague-Visby Rules* (Kluwer Law, 2000), 60.

⁵⁷ See W. E. Astle *Shipping and the Law* (Fairplay Publication, 1980), 87.

⁵⁸ See W. E. Astle *Shipping and the Law* (Fairplay Publication, 1980), 87.

⁵⁹ W. Tetley, *Admiralty Law*, 84, Sze, *Liability*, 60.

⁶⁰ Sze Ping-fat *Carrier's Liability under the Hague, Hague-Visby Rules* (Kluwer Law International, 2000), 60. It might be right to say that the ISM Code strengthened the connection between the shipping standard and seaworthiness, but does not create the view that the shipping standard is part of the seaworthiness evaluation. However, the code may provide the basis for deciding fault or lack of due diligence.

⁶¹ *President of India v West Coast Steamship Company (The Portland Trader)* [164] 2 Lloyd's Rep. 443. (United States case); *American Smelting & Refining Co. v S. S. 'Irish Spruce' and Irish Shipping Co. Ltd (The Irish Spruce)* [1976] 1 Lloyd's Rep. 63, at p. 68. (US District Court of New York).

⁶² Clause 52 of the Shelltime 4: 'Owners warrant that the vessel is in all respects eligible under application (*sic*) conventions, laws and regulations for trading to and from the ports and places specified in Clause 4 of the Charter Party...but not limited to, MARPOL 1973/1978 as amended and SOLAS 1974/1978 as amended and extended.'

⁶³ *Golden Fleece Maritime Inc v ST Shipping and Transport Inc (The Elli & The Frixos)* [2008] 2 Lloyd's Rep. 119; [2009] 1 All ER (Comm) 908.

end of the charter period, new MARPOL Regulations 13F, 13G and 13H came into force which required all oil tankers to have the relevant documents relating to the physical condition of the vessel in order to carry heavy grade oil cargo. Vessels should be fitted with double bottoms or double sides, extending along the total length of the cargo tanks. The double bottom tanks of *The Elli* and *The Frixos* did not run the entire length of the cargo tanks. Instead, bunker tanks protected the last two tanks (slops tanks) rather than ballast tanks as required by the new MARPOL regulations. It was held that the warranty in Clause 52 of the charter applied to both upon and after delivery of the vessels to the charterer. Furthermore, the same clause explicitly applied to future sailings and expressly referred to the SOLAS and MARPOL Conventions. Thus the vessel was unseaworthy for not complying with the new amendment of MARPOL as required in Clause 52.⁶⁴ It is arguable as to whether the industry standards always meant that the standard of due diligence resulted in a seaworthy vessel.⁶⁵ This statement would be beyond doubt if a clear obligation in the contract of carriage enforced the shipowner to adopt the new regulations. This is commensurate with saying that the obligation is an ongoing one. But is it enough to overcome the above problems and adopt future shipping industry and therefore add a provision in the charterparty to impose a continuous obligation on the carrier?

Because the obligation of obtaining a document relating to SOLAS or other certificates of the IMO were not required prior to the commencement of the voyage or at least at the time of delivery, this does not equate to the obligation to 'maintain the vessel in or restore her to' her condition on delivery. Therefore, the standard of seaworthiness does not render it to be adequate even if a provision in the charterparty is imposing a continuous obligation of seaworthiness for the entire voyage without a maintenance clause similar to Clause 3(a) in the Shelltime 4. For that reason, the seaworthiness standard will be based on a standard that was set at the time before and at the beginning of the voyage or at her delivery which is not an adequate standard if a new regulation is being enforced after the commencement of the voyage. Thus, it would not be regarded as a duty after the beginning of the voyage. Furthermore, not any maintenance obligation would be a solution. For example, a form such as NYPE⁶⁶ would not impose adequate obligation of seaworthiness to solve the problem even if requiring the owner to maintain the vessel in 'a thoroughly efficient state in hull and machinery during service',

⁶⁴ It is difficult to argue that obtaining a document which was not required at the time of delivery can be part of an obligation to 'maintain the vessel in or restore her to' the condition in which she was at delivery.

⁶⁵ In some countries, they have taken the lead in promoting safety and seaworthy vessels by adopting new navigational and other safety requirements in advance of the international conventions. Ropner, W. G. D. *Promoting High Standards at Sea - The Shipowners' Contribution: a paper delivered in Fitness at Sea - The International Conference on Seaworthiness in 1980* organised by Newcastle University, at p. 44.

⁶⁶ NYPE 1993 cl.6, also Clause 1 of the NYPE. It was said that 'New York Product form differs from the Shelltime form in that it requires to maintain the efficiency of the ship for the service, rather than her fitness.'

because it omits the requirement that she be efficient for the service, rather than her fitness.⁶⁷ The same is relevant with the Shelltime 4⁶⁸ combined with the obligation of due diligence. The carrier will be only required to exercise due diligence to maintain or restore the vessel to the original status as was prior to the commencement of the voyage, unless if Clause 3(a) is being added to the charter and is not confined to hull, machinery or equipment which has deteriorated since delivery. If a new SOLAS requirement came into force or it was suggested to fit new equipment or to modify the structure of the vessel, then the carrier has to take a diligence effort to restore such changes.⁶⁹

The standard is, however, said to be raised if a new regulation under the conventions comes into existence requiring the shipowner to carry out further tasks, such as modification to the hull, other than those previously required for maintaining the vessel. This is only possible if there is a clause in the charterparty contract obliging the shipowner to do so, i.e. Clause 52 of the Shelltime 4. Otherwise, the owner is obliged to carry out such modification before a new contract of carriage is agreed, when the regulation would be part of an initial obligation of due diligence.⁷⁰

The Elli and *The Frixos* case confirmed that the court will not take into consideration developments in the industry that might take place any time after the vessel commences her voyage during the course of the charter period as part of the seaworthiness obligation even if the obligation was a continuous one. Therefore, it was noted that considerations of expediency are already reflected in the charterparty contract and to add a clauses to them would indicate an extension of the shipowner's obligation in maintaining the fitness of the vessel rather than the basic obligation of the Hague/Hague-Visby Rules.

⁶⁷ See Terence Coghlin, Andrew W. Baker, Julian Kenny and John D. Kimball *Time Charter* (6th edn., 2008), para. 11.17.

⁶⁸ Words appear in Line 6, introducing Clause 1 and is Line 45. See *Time Charters*, para.38.23. See *The Fina Samco* [1994] 1 Lloyd's Rep. 153, in a report of the first instance court Colman J. stated that: 'the clause expressly contemplates that in the course of the charter service the passage of time or wear and tear or an event make it necessary for the owners to take action so that the vessel is maintained in the condition which she was required to have on delivery or, having lost that condition, is restored to it. The clause directs itself to a need to act which arises *after* delivery. It assumes that at delivery the vessel did have the required characteristics but that after delivery something has happened which either has already caused the vessel to lose one or other of those characteristics or will in future do so unless the owners act to maintain that characteristic. It is in those circumstances that the owner's duty to exercise due diligence arises.' at p.153. See also *The Trade Nomad* [1998] 1 Lloyd's Rep. 57, upheld the court of appeal decision [1999] 1 Lloyd's Rep. 723.

⁶⁹ *The Elli* and *The Frixos* [2008] 1 Lloyd's Rep. 262 [2008] 2 Lloyd's Rep. 119.

⁷⁰ To that extent, the charterer will be prevented from trading to some parts of the world. *Golden Fleece Maritime Inc v ST Shipping and Transport Inc (The Elli & The Frixos)* [2008] 2 Lloyd's Rep. 119, at p.127. Sir Anthony Clarke MR concluding 'at a particular South East Asian country suddenly required all fuel oil carrying vessels to be doubled hulled.'

If a contract of carriage is governed by the Hague/Hague-Visby Rules, the shipowner tends to rely mainly on the case law that states: ‘It is not the duty of an owner to adopt or use the latest inventions or regulations’⁷¹ which seems to make the need for new equipment non-essential. In other words, the shipowner would be reluctant to adopt new provisions of SOLAS or any other regulations; for example, to fit new equipment when their presence is essential to the vessel’s seaworthiness,⁷² such as radar equipment⁷³ or a Loran system.⁷⁴

Perhaps, if there is no binding system in the context of the contract of carriage, compliance with new non-enforced regulations will result in shipowners relying on the ‘slowness of the traditional procedure for adoption and entry coming into force of the international regulations and conventions.’⁷⁵ Nonetheless, adherence to the new standards of an existing law will only be imposed during the initial obligation of due diligence.

In order to arrive at a proper conclusion, one may have the notion that there is a close analogical point between, on the one hand, case law that rendered the carrier/shipowner liable for unseaworthiness due to damage caused by not providing their master and crew with diagrams or plans of the ship’s recently fitted equipment or modifications,⁷⁶ or, on the other hand, the future readiness of the court to render the vessel unseaworthy for not fitting the equipment that is required by the industry.

This section suggests that the current law in seaworthiness needs improvement. This will be the following point.

Problems of the current law - the need for improvement

The Hague/Hague-Visby Rules state that:

⁷¹ *F. C. Bradley & Sons Ltd v Federal Steam Navigation Company*, *supra*, see Lord Justice Scrutton at pp. 454-455. See also *Virginia Co. v Norfolk Shipping Co.* 17 Com. Cas. 277 at p. 278.

⁷² *The T. J. Hooper* 60 F.2d 737, 1932 AMC 1169 (2 Cir. 1932), Hand J. decided that tugs should be equipped with radios, although their use on such vessels at that time was still not customary. Also see Professor William Tetley *Marine Cargo Claims* (4th edn, 2008), Chapter 15 *Due Diligence to Make the Ship Seaworthy* at p. 42, taken from Professor Tetley’s website: <www.mcgill.ca/maritimelaw/mcc4th/>.

⁷³ In *President of India v Coast S.S. Co (S.S. Portland Trader)* 213 F. Supp 352 at pp.356-357, 1963 AMC 649 at p.654, [1963] 2 Lloyd’s Rep. 278 at p.281 (D. Ore. 1962), The District J commented on the desirability of vessels having radar on board. The judge warned however that in the near future it was most likely that radar would become a condition of seaworthiness. The court said that, with the brilliant clarity of hindsight, it was easy to rationalise how the disaster could have been avoided if the vessel had been equipped with either one of these modern aids to navigation (radar or Loran), but the court has the duty to determine the seaworthiness of the vessel from the standpoint of the commencement of the voyage rather than measuring the standard by what happened at the time of occurrence.

⁷⁴ A subsequent judgment on this question is *Argo Merchant Lim Procs.* 486 F. Supp. 436 at p.459. 1980 AMC 1686 at p.1702 (S.D. N.Y. 1980). Loran was not deemed essential.

⁷⁵ Sir Michael Wood: *Lawmaking and implementation in International Shipping: Which Law Do We Obey?* Tenth Cadwallader Memorial Lecture, 1 October 2008. Cited: <www.shippinglbc.com/content/uploads/documents/cad10_mensah.pdf>.

⁷⁶ See *Robin Hood Flour Mills Ltd v N. M. Paterson & Sons Ltd (The Farrandoc)* [1967] 2 Lloyd’s Rep. 276.

“The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

- (a) Make the ship seaworthy;
- (b) Properly man, equip and supply the ship;
- (c) Make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation;
- (d) The above article of the Hague/Hague-Visby Rules illustrates that the obligation of due diligence expires upon sailing from the port of loading and does not apply at each stage of the voyage.⁷⁷ Any new requirements under the regulations that govern the standard of the industry will not be adopted after leaving the load port. This is normally the case for an obligation under the Rules which starts and is ongoing until the time the vessel commences her voyage. As this shows, the Rules give no obligation on the part of the shipowner to imposing an ongoing exercise of due diligence, i.e. adopting new regulations during the sea voyage. This apparently avoids the important ongoing duty to keep the vessel in line with the latest regulations, especially those important regulations which, if contravened, will constitute unseaworthiness.

i) The need for new Rules - prospective of container shipping

The English court has expressed the relevant test as being: ‘would a prudent shipowner, if he had known of the defect, have sent the ship to sea in that condition?’ Equally, the test to be applied under the Rotterdam Rules for a vessel that has not adhered to new regulations which may affect her seaworthiness is: ‘would a prudent shipowner, if he had known of the new regulations, have continued the intermediate voyage without affecting any possible compliance?’ In the age of containerised shipping, it seems that vessels are more than likely to call into intermediate ports.⁷⁸ This is where the ongoing obligation of due diligence under the Rotterdam Rules becomes more important in solving the problems of unseaworthiness that might arise due to non-compliance with the new regulations, especially in the age of containerised vessels which were invented before the drafting of the Hague/Hague-Visby Rules. Under the later Rules, it is

⁷⁷ Article III r. 1.

⁷⁸ It is common for container vessels to be involved with large numbers of loading/discharging ports. For instance, a container vessel may load cargo from the Far East destined to North Africa and en route she may call at two ports in the Middle East.

possible that one of two adjacently loaded containers could be subject to different findings on the question of the liability of the carrier, depending on the port of loading.

For instance, assume a vessel commenced her voyage from Port A to Port C and called at Port B with perishable refrigerated cargo onboard. She loaded the container in Port A and was classed as being seaworthy at that time, and then sailed to Port B where she loaded another container destined for Port C. In the course of sailing to Port C, a new regulation came into force. When she arrived at Port C, the vessel was detained for some days by the port state for not having a valid certificate reflecting the compliance with the new regulation which resulted in the refrigerated cargo being damaged. Subsequently, the vessel would be regarded as seaworthy for the container loaded in Port A, whereas she would be considered unseaworthy for the container that was loaded in Port B. The shipowner,⁷⁹ therefore, will incur the liability for unseaworthiness for breaching the overriding obligation, thus he is not allowed to use any of the exceptions under Article IV r. 2. On the other hand, for the container loaded in Port A, the shipowner is able to use exceptions under the Article IV r. 2 despite the damage to the cargo which resulted from the same reasons but the effect was different for each of the owners of the containerised cargo.⁸⁰ Therefore, the change brought about by the context of Article 14 of the Rotterdam Rules is likely to lead to fairer consequences in such circumstances. If the Rotterdam Rules were incorporated into the charterparty, the court in a case similar to the above would, hypothetically, undoubtedly hold the shipowner in breach of exercising due diligence to provide a seaworthy vessel. There are reasons why an English court would reach a similar decision and would not find a less favourable compliance with a new regulation, such as SOLAS. Therefore, it is submitted that it would be impossible for a carrier to exercise due diligence mid-voyage or en route for the purpose of keeping the vessel seaworthy.⁸¹ First, the English court was not unfamiliar with the ongoing duty that was applied on certain occasions to time charterparties, which contained a clause obliging the shipowner to ensure the fitness of his vessel on an ongoing basis, even in the course of the voyage after the vessel had commenced her trip.⁸² This

⁷⁹ In *Leesh River Tea Co. v British India Steam Navigation Co.* [1966] 2 Lloyd's Rep. 193, it was held that, where seawater damaged cargo due to the pilferage of the cover plate of a storm valve at an intermediate port while loading of another cargo, there was unseaworthiness after loading within the scope of Article 4(2)(q) of the Hague Rules.

⁸⁰ This principle is applicable even where the containerised cargoes are subject to the same contract of carriage but loaded at different neighbouring ports for the same destination. See F. Berlingier *The Liability of the Carrier by Sea in Studies on the Revision of the Brussels Conventions on Bills of Lading* (Genoa, 1974), 68 and 95.

⁸¹ See Andrew Nicholas, 'The duties of carriers under the conventions: care and seaworthiness', in D. R. Thomas (ed) *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd's List, 2010), para 6.13.

⁸² Maintenance clauses, such as NYPE 1946 charterparty in lines 36-38, state the following: 'that the owners shall maintain the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service.' See also NYPE 93 Clause 6 lines 80-82. BALTIME 1939, Clause 3 lines 43-48. GENTIME Clause 11 lines 263-267. Also see the above case *Golden Fleece Maritime Inc v ST Shipping and Transport Inc (The Elli & The Frixos)* [2008] 2 Lloyd's Rep. 119.

means that if a case of unseaworthiness occurred after leaving the port of loading, the shipowner, his servants or agents should exercise due diligence to bring the vessel to a seaworthy state.⁸³ Secondly, the law of doctoring of stages, under common law, is believed to be a good law. It provides some commercial flexibility for vessels to commence their voyage from their loading port without incurring superfluous delays by complying with charterparty obligations to provide a seaworthy vessel. This is, for example, when the condition of the vessel has a deficiency or cannot comply with the regulations at the loading stage which may not amount to a breach of the duty of seaworthiness, provided it is remedied by the sailing stage or at an intermediate stage.⁸⁴ By analogy, the common law⁸⁵ doctrine of stages with the maintenance of obligation means that the English courts would not find it difficult to adopt a system that renders the vessel seaworthy on calling in at intermediate ports, not only for loading/unloading, but in case of a container vessel exercising due diligence in complying to the latest regulations, such as fitting a small piece of equipment or adding an important publication to the documentations of the vessel, for the purpose of maintaining the obligation of seaworthiness during the course of the voyage. It is widely known that nowadays, ports are well-equipped with agents and ship chandlers who are able to provide the vessels with supplies and repair services during their loading/unloading operations.

ii) Potential effect of the Rotterdam Rules on the obligation of seaworthiness

This raises the issue as to whether the advent of the Rotterdam Rules will lead to a rise in the standards shown by the shipowner and to be proactive in furnishing his vessel to a higher standard, i.e. adopting the new regulations of the industry, rather than to react to and adopt them at a later stage. Consequently, he will avoid the breach of the continuous due diligence obligation which is likely to occur. The ISM Code requires the shipowner to establish and maintain procedures for repairs and scheduled regular maintenance for his vessel and to ensure that she is fit and complies with the applicable rules and regulations in a timely manner in

⁸³ *Snia v Suzuki* (1924) 17 Ll. L. Rep. 78, Greer, J. said: 'though that does not mean that she will be in such a state during every minute of the service, it does mean that when she gets into a condition when she is not thoroughly efficient in hull and machinery they will take, within a reasonable time, reasonable steps to put her into that condition' at p. 88.

⁸⁴ *The Quebec Marine Insurance Company v The Commercial Bank of Canada* (1869-71) L.R. 3 P.C. 234. Lord Penzance stated: 'The case of *Dixon v Sadler* and the other cases which have been cited, leave it beyond doubt that there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward of a whaling voyage, for some definite, well-recognised, and distinctly separate stage of the voyage.' *The Vortigern* [1899], p.140.

⁸⁵ The charterparty doctrine of stages, under which the vessel is required to be seaworthy at the commencement of each stage, is not applicable under the Hague/Hague-Visby Rules. See *Leesh River Tea Co. v British India Steam Navigation Co.* [1966] 2 Lloyd's Rep. 193. A vessel was held not to be unseaworthy within the meaning of Article III when the cargo was damaged by the surreptitious removal of a storm valve plate by a person unknown while the vessel was calling at an intermediate port.

respect of the trade, cargo and crew. However, the industry, for newly emerged regulations, allows some flexibility for the shipowner to comply.⁸⁶

The case would be different under a contract of carriage that incorporates the Rotterdam Rules. The additional words ‘and during the voyage by sea’ in context of Article 14 has addressed an ongoing due diligence to make the vessel seaworthy throughout the course of a voyage. The Rules are expected to raise the standard of due diligence and improve the position of the cargo interests for many reasons. On the one hand, the effect of the Rotterdam Rules, if it was incorporated to the bill of lading or carriage contract, will set aside flexibility in the regulation in regard to their compliance. The obligation to exercise due diligence to make the vessel seaworthy ‘at the beginning of, and during the voyage’⁸⁷ will equally amount to an express clause⁸⁸ that may be surpassed by the obligation ‘during the voyage’ over the granted flexibility to comply with the regulation instanced by *The Elli* and *The Frixos* when the Court of Appeal’s judgment stated that: ‘the vessel is in all aspects eligible under applicable conventions, laws and regulations for trading to and from the ports and place.’⁸⁹ For this purpose, owners will need to comply with the amendments or extensions of the shipping industry, which might affect the trading of the vessel.⁹⁰ In addition, the seriousness of the consequences of a particular kind of non-compliance with a regulation that has not yet been enforced brings up the question of whether the shipowner would be keen to prepare for a compliance in advance before the regulation had become compulsory bearing in mind that the ‘compliance with conventions such as MARPOL or SOLAS is [n]ot in itself a meaningless concept’ which ‘relates to compliance while performing the charterparty service ...’ Clearly, a vessel in dry dock can be modified for compliance more easily than a vessel performing her duty under the charterparty contract.⁹¹

⁸⁶ For example, the phasing out of single hull tankers for categories 2 and 3 built in 1984 or later to be allowed to sail until 2010. Also, the IMO does not have to penalise failure to comply. See ‘IMO to avoid flag sanctions’, *Lloyd’s List*, 1 Sept. 1998.

⁸⁷ Article 14 (Specific obligation applicable to the voyage by sea) of the Rotterdam Rules: ‘The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to: (a) Make and keep the ship seaworthy; (b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage ...’

⁸⁸ Clause 52 of Shelltime 4: ‘Owners warrant that the vessel is in all respects eligible under application (sic) conventions, laws, regulations and ordinances of any international, national, state or local government entity having jurisdiction including, but not limited to, the US Port and Tanker Safety Act, as amended; the US Federal Water Pollution Control Act, as amended; MARPOL 1973/1978 as amended and extended; SOLAS 1974/1978/1983 as amended and extended; and OPA 1990.’

⁸⁹ *Golden Fleece Maritime Inc v St Shipping and Transport Inc (The Elli and The Frixos)* [2008] EWCA Civ 548, para. 24.

⁹⁰ See *Golden Fleece Maritime Inc v St Shipping and Transport Inc (The Elli and The Frixos)* 1 Lloyd’s Rep. 262. Where the inconsistency appears in clause 1(g) between the opening words in the heading ‘At the date of delivery of the vessel under this charter’ and the requirement within the wording in para. (g) to have ‘on board all certificates, documents ... required from time to time’ was surpassed by the Court of Appeal by giving prevalence to the particular words in sub para. (g) over the general words in the heading of para. 1, on the basis that ‘the particular should prevail over the general.’

⁹¹ The nature of the intended voyage may affect the stringency with which the ship is examined before sailing. See for example *The Assunzione* [1956] 2 Lloyd’s Rep. 468 at p.487.

Therefore, this will make the shipowner keen to comply with the regulations prior to the date of enforcement.⁹² On the other hand, commercially speaking, on some occasions it would be more convenient for the shipowner to comply with the regulations in advance of entering into a contract of carriage, such as a liner contract. At a later stage, during the course of performing the contract of carriage, the vessel might be constrained when trading between ports that have no facilities, such as a dry dock, from providing the services required for compliance. It is worth stressing that *The Elli* case alluded to the ongoing obligation. This will make shipowners the bearers of the cost of compliance as well as incurring any financial loss attributed from a delay in compliance.⁹³ The shipowner, being contractually responsible (Rotterdam Rules), would raise the burden of the obligation by making him more conscious of investing in an earlier compliance with the relevant regulations.

Furthermore, the standard of ‘due diligence of a prudent shipowner, as at the relevant act or omissions, must not be judged in light of hindsight.’⁹⁴ It would not be necessary for a shipowner of container vessels to appreciate when a regulation comes into force if the prudent shipowner had complied with such a regulation in advance, prior to the date of enforcement. The shipowner would have set a proper system within the vessel’s SMS in order to maintain the regulations as part of the ongoing due diligence obligation and, therefore, comply with any potential regulations to avoid the unseaworthiness of his vessel.⁹⁵ It is for this reason that constant regulations and observances are believed to have a similar effect on the normal routine on the vessel’s machinery to provide a seaworthy vessel.

iii) The differences in the standard of seaworthiness

As mentioned above, the standard that courts should take into consideration in deciding whether the vessel is seaworthy is the shipping standard at the time of the incident. It has been held in

⁹² The duty of seaworthiness imposed on the carrier under the Rotterdam Rules is that of due diligence, therefore, the test is objective and taking into account international standards and the particular circumstances of the case. See *The Kapitan Sakharov* [2000] 2 Lloyd’s Rep. 255, at p.266. (where stowage of container under deck is breach of SOLS and IMDG).

⁹³ See Knowles, B. *Who bears the cost of change?* Vol.22 (6), (July, 2008). ISBN: 1742-9404.

⁹⁴ The owners of cargo lately laden on board the ship *Subro Valour* v *The owners of the ship Subro Vega* (*The Subro Valour*) [1995] 1 Lloyd’s Rep. 509 at 516. Clark J. stated in this case: the plaintiff cargo-interests claimed damages against the defendant shipowner in respect of loss to a cargo of peas sustained as a result of a fire on the vessel. The court held that the cause of the fire that made the loss was an electrical fault which was in turn caused by mechanical damage to the wiring. It followed that the vessel was unseaworthy at the commencement of the voyage. No one suggested that conditions during the voyage were in any way unexpected or out of the ordinary.

⁹⁵ *The Toledo* [1995] 1 Lloyd’s Rep. 40 at p.50. Clarke J. held that the shipowner had failed to exercise due diligence to provide a seaworthy vessel before the vessel commenced her voyage, also he added that a reasonable shipowner would have set up a proper system for the inspection and ascertainment of the internal damage or problems which caused the unseaworthiness.

the USA⁹⁶ that the standard of seaworthiness (that is determined by the shipping standard) is depending to the ports of the state to which the vessel belongs rather than by the needed standard for the contemplated voyage.⁹⁷ In other words, the standard of the shipping industry deemed necessary for the seaworthiness of the vessel is not determined by the need to make the vessel fit for the peril of the contemplated voyage, but it is determined in relation to the standard of shipping and safety generally accepted in the trade or the custom and usage of the port or country from which the vessel sails.⁹⁸ More importantly, this approach will render a variable standard of seaworthiness for two vessels on the same journey, depending on the port where the vessel starts the journey from. Thus, a British flag vessel could be rendered unseaworthy for an accident that occurred in the English Mediterranean Sea because, for instance, it is not fitted with the navigational equipment required by an international convention. Whereas, a Cyprus flag vessel involved in the same incident would not be considered unseaworthy.⁹⁹ This hypothetical example shows that the countries consider differently the matters to which seaworthiness extends, according to the nationality of the vessel. This is another reason that charterparty, and particularly those with the SOLAS, ISM or MARPOL clauses, require that the vessel must be continuously maintained to keep abreast of new developments and technology. The effect of this clause would continuously keep the vessel seaworthy for the entire voyage. To overcome this problem the reduction of the standard of seaworthiness that might result from considering the standard according to the country where the voyage started rather than by the peril of the contemplated voyage.

Furthermore, it is worth mentioning that the Rotterdam Rules would turn up to be relevant; not only to circumstances where a defect in a vessel manifests itself requiring repair, but also having an influence on the shipowners to equip their vessels to a higher standard¹⁰⁰ by implementing

⁹⁶ See *Tidmarsh v Washington Ins Co.* (1827) 4 Mason 439 where Story J said that: 'It seems to me that where a policy is underwritten on a foreign vessel, belonging to a foreign country, the underwriter must be taken to have a knowledge of the common usages of trade in such country as to equipment of the vessel of that class, for the voyage in which she is destined.' Also, see Sir M. Mustill and Gilman, J. C. B. *Arnould's Law of Marine Insurance and Average* (16th edn, 1981) para. 732.

⁹⁷ This approach is inconsistent with the Marine Insurance Act, Section 39(4): 'A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.'

⁹⁸ See *Cocoa v S.S. Lindenbank* [1979] AMC 283 SDNY. 'Whether a ship is considered seaworthy depends on her state of repair and fitness of her equipment and crew in relation to the standard of safety generally accepted in the trade or the custom and usage of the port or country from which the vessel sails' at p.296.

⁹⁹ Another example is also relevant that a vessel in hot climatic countries is not required to be fitted with equipment for ice areas. Therefore, in applying the American approach, a vessel that sails from a hot climatic port would not be rendered unseaworthy for trading in the Northern Baltic, despite the fact of her incapacity to penetrate ice area in the Northern Baltic.

¹⁰⁰ See Nicholas, A. 'The duties of carriers under the conventions: care and seaworthiness' cited as Chapter 6 in D. R. Thomas (ed) *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd's List, 2010), para 6.13.

the latest inventions of equipment to avoid the unseaworthiness in a situation similar to the above hypothetical example.

iv) The nautical error

So, as long as the carrier has exercised due diligence to make the vessel seaworthy, he may rely on the exceptions in Article IV r.2 of the Hague/Hague-Visby Rules. Article IV r.2(a) exception reads that ‘an act of neglect or default of the Master, mariners, pilot or the servants of the owners in the navigation or the management of the vessel’ is of great significance because the general exception clause in the charterparty might not embrace nautical negligence of the crew, whereas Article IV r.2(a) does.¹⁰¹ Therefore, if the carrier exercises due diligence in recruiting a second officer who holds the required certification and that second officer has the basic ability to perform his job properly but fails to carry them out, he is acting negligently in navigation during his alluded watch and the vessel, as a result, has collided. The carrier is exempted from liability relating to such navigational error.¹⁰² Despite the fact that there is a little chance that the carrier, in case of crew negligence in navigation, is not always exempted,¹⁰³ therefore establishing that the crew were incompetent (and, in turn, the vessel unseaworthy) is paramount. A carrier may still have a defence to an unseaworthiness claim if he can prove that he exercised ‘due diligence’ in providing a competent crew.¹⁰⁴ Carriers must not enjoy the exclusion to navigational errors; they virtually always have control of the evidence at the inception of the case, which can make proving incompetence a daunting task on the part of the cargo-interest. In addition, the above argument suggests that part of keeping the vessel seaworthy is to keep abreast with all shipping standards, which, *inter alia*, enhance the safety of the vessel and thus prevent from rendering the vessel unseaworthy. A final point, it must be noted that the improvement of communication and navigational technology, i.e. GPS, radar and electronic charts, assist the officer of the watch in navigating safely and therefore, reduces the navigational fault. Therefore, it must be said that a similar increase in demand on the qualitative standard of the vessel must be demanded in the sphere of charterparty.

Over what has been said above, one might ask whether it is fair and sound imposing on the part of the carrier in the charterparty an extended obligation of seaworthiness?

Winn LJ in the court of appeal stated that: ‘The law must apply a standard which is not relaxed to cater for their factual ignorance of all activities outside brewing: having become owners of

¹⁰¹ See Yvonne Baatz *Maritime Law* (Sweet & Maxwell, 2011), at p.140.

¹⁰² *Blackfriars Lighterage & Cartage Co. Ltd v R. L. Hobbs (The Landeer)* [1955] 2 Lloyd’s Rep. 554.

¹⁰³ Because, i.e. The ISM Code poses an obligation on the carrier company to ensure that all seamen serving on board the vessel must be competent to carry out their duties as well as that the crew as a unit must be in a position to perform as a team. This will provide the carrier with the necessary evidence to prove the exercise of seaworthiness.

¹⁰⁴ See Roger White *The human factor in unseaworthiness claims* [1995] LMCLQ, 221, at p.239.

ships, they must behave as reasonable shipowner.’ A relaxed standard must not be permitted, where an unseaworthy vessel is not merely risking her safety and her cargo, but also risking other vessels and the personnel on board as well as the environment. The cost of keeping a vessel seaworthy is not necessarily more expensive than incurring a claim.¹⁰⁵ One can suggest that avoidance of accidents, due to prolonged seaworthiness, helps to promote the adoption of the shipping industry, whereby an increase directly or indirectly of the safety of the vessel results in unnecessary costs incurred from accidents and their consequences on the insurance premiums would be avoided.

The attitude of the court, on the one hand, moves slowly toward adopting a higher standard including the commercial considerations, i.e. cutting costs; on the other hand, it would affect the seaworthiness of the vessel. This would be stopped or reduced by imposing a continuous seaworthiness on the carrier for the entire voyage.

Conclusion

It can be concluded that, on the optimistic side, the shipping industry is proving to be of considerable importance for the vessels’ seaworthiness. The shipping industry can be said to increasing, to some extent, the standards of due diligence and eventually minimising the possibility of unseaworthiness of vessels operating at sea. Seaworthiness is a particular aspect that promotes safety and is regulated primarily by the shipping standard conventions, such as SOLAS, Loadline and STCW...etc.

However, the downside is that it is left to the member states to apply these conventions. Some states might apply these conventions more strictly, while others may be more lax, due to poor resources, supervision, enforcement or even inefficiency of convention standards themselves. Consequently, seaworthiness cannot be guaranteed, at least by the relevant conventions. Consequently, standards may be lowered and differences appear between member states applying the conventions with varying degrees of strictness.¹⁰⁶

Furthermore, not only old vessels can be unseaworthy. Accidents can also happen to modern vessels built and equipped to the latest shipping standards but manned by incompetent or

¹⁰⁵ Donaldson Reports, paragraph 8.12, which states: ‘[we] believe that it should be made abundantly clear that it is against the long-term commercial interest of shipowners for them to ignore safety considerations, as a few evidently do.’

¹⁰⁶ Shipping companies might be encouraged to register their vessels in flag states which have neither administration nor independent surveyors and who have promulgated no laws, decrees, orders or regulations and have set no standards for seaworthiness. See Sass, C. A. ‘*The Enforcement of Safety Standards on Board Merchant Vessels*’, pp. 66-77, delivered as a paper in the Fitness at Sea: An International Conference on Seaworthiness, (9-10 ?month?, 1980) held at Newcastle University.

inadequate seafarers who have inadequate training from substandard marine schools, or are suffering from fatigue.

In order to improve the effectiveness of shipping industry standards, they should be applied effectively. This can be achieved if the IMO were to create a scheme of sanctions applying to all the states parties to the relevant convention. Such a scheme might include creating a blacklist of shipowners, vessels, marine institutions and especially member states and may withdraw the right to issue certification.¹⁰⁷ Also, the relevant provisions of the convention should be checked by IMO personnel,¹⁰⁸ or it should assign such a task to a reputable entity to check that the standards are strictly applied.

It should be noted that the onerousness of the obligation of due diligence sometimes needs to be re-examined during the voyage. If, for example, the vessel encounters unusual problems then the shipowner should 'engage staff of exceptional ability, experience and dependability'.¹⁰⁹ This indicates a necessity to examine the existing law to extend the obligation of due diligence for the whole voyage, as is the case under the Rotterdam Rules. This might be a difficult route to follow. A clause in the charter party to impose a continuous obligation to make the vessel fit for the entire voyage would be a quicker choice. This should not be considered a problem as the industry had already adopted such an approach which can be seen in some recent charterparties. In fact, the continuous obligation is in line with the present and future practice of shipping industries utilising the burgeoning advances in communications and navigation. Common sense says that the development of new regulations and conventions, concurrent with the needs of development to some charterparties as a quick solution in case the Rotterdam Rules adoption is taking time or never to be adopted.

Adopting the Rotterdam Rules is not a choice that can simply be made by the party of the contract; there are several elements that contribute in the process of their adoption, i.e. political, thus, their adoption, if it takes place, needs time. Adding a clause in the charterparty might be a better solution; imposing on the part of the carrier a continuous obligation of seaworthiness for the entire voyage rather than limiting it to the onset of the voyage.

¹⁰⁷ Lord Donaldson of Lynton. 'The ISM Code: The road to discovery?' *Lloyd's Maritime and Commercial Law Quarterly* 4 (1998), 526-534 at p. 532. An example was given on the ISM Code.

¹⁰⁸ In order for IMO to carry out such a task, the number of its personnel should be increased. Currently, there are only 300 staff.

¹⁰⁹ *The Hong Kong Fir* [1961] 1 Lloyd's Rep. 159 at p.169.

Supply of Containers and “Seaworthiness”- Rotterdam Rules Prospective

Introduction

Under the current law, represented by the Hague/Hague-Visby Rules and common law, the carrier is under an obligation of providing a seaworthy vessel before and at the beginning of the sea voyage.¹¹⁰ The introduction of the Rotterdam Rules, in particular Article 14, imposes on the carrier additional duties from those under the current law in which to be fulfilled during the voyage by sea. This article will shed light on: first, the duty on the carrier to exercise due diligence to provide a seaworthy container; and second, that the extension of the obligation of seaworthiness will cover the whole of the sea voyage rather than merely ‘before and at the beginning of the voyage’. In light of those extended duties under the Rotterdam Rules, this article will also shed light on their implication and their necessity for the presence to the shipping industry. The article establishes solutions to the extension of seaworthiness in regards to the container and the period of duty which is possible to be applied to the current law.

The development and the use of containerisation

One of the most important technological developments in the transportation of goods by sea since powered vessel replaced sail was the advent of the container revolution. Goods have been stowed in containers since 1950, These devices, in which goods are carried have: 1) encountered some outer risks such as thievery and larceny; 2) climate and sea damage; 3) decreased transshipment expenses by reducing the time of loading and unloading¹¹¹; 4) lessened the cost of packing on the part of the shipper; and 5) reducing the conveyance of goods by more than one means.¹¹² The cargo is separated

¹¹⁰ Article 3(1) of the Hague/Hague-Visby Rules: The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to

- (b) Make the ship seaworthy;
- (c) Properly man, equip and supply the ship;
- (d) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

¹¹¹ The stowing and trimming of a general cargo ship is a task which calls for highly skilled workmanship. For further information see De Wit, R. *Multimodal Transport* (LLP, 1995) at p.9

¹¹² Simon, *The Law of Shipping Containers* 5 J. Mar. L. & Com. 507, April 1974 at p. 510; Tombari, H. *Trends in Ocean-born Containerisation and its Implications for the US*

inside the container by its consolidation in a container. A container is an article of transport containing goods to be loaded onto and off the vessel quickly and easily and to safeguard them from external risks. It is usually manufactured from metal for multiple uses.¹¹³

The container has a double function. On the one hand and from the carrier's viewpoint, it may be regarded as an extension or part of the vessel's hold because it protects the cargo on its own; but, unlike the vessel's hold, it is a mobile thing which can be transported to the carrier to be loaded, or to the cargo receiver to be discharged.¹¹⁴ On the other hand and by contrast, from the cargo interest's view, it has a purpose and a character similar to a package securing cargo.¹¹⁵ The question here is: Does the current regime correspond with the use of containerisation in the marine industry and if not, what is the possible solution?

The current law excludes the seaworthiness with regards to the container which creates problems. An example of how this would happen will assist. A typical scenario: an unfit container on board a container vessel may either cause damage to the cargo inside, or to cargo in the adjacent containers. By so doing, the carrier is not only exposing the carried cargo to damage or loss, but might also be endangering the safety of the vessel. Furthermore, the requirement of due diligence does not only encompass safe cargoes and vessels, but it will also provide an objective liability rule for

Liner Industry 10 J. Mar. L. & Com. 311 (1979) at p.311; Schmeltzer, E. and Peavy, R. A. *Prospective and Problems of the Containers* 5 J. Mar. L. & Com. 507, April 1974 at p.510

¹¹³ See the definition given by the International Organisation for Standardisation (ISO) adopted a general definition of a container which covers a wide range of equipment. A container is defined as an article of transport equipment:

- (a) Of a permanent character and accordingly strong enough to be suitable for repeated use;
- (b) Specially designed to facilitate the carriage of goods by one or more modes of transport, without intermediate reloading;
- (c) Fitted with devices permitting its ready handling, particularly its transfer from one mode of transport to another
- (d) So designed as to be easy to fill and empty;
- (e) Having an internal volume of one cubic meter or more but excluding vehicles or conventional packing.

¹¹⁴ *Northeast Marine Term Co v Caputo* 432 US 249, 271 (1977). Armstrong, T. J. *Packing Trends and Implications in the Container Revolution* 12 J. Mar. L. & Com. 427 (1981) at p.428

¹¹⁵ As distinct from package, a container saves expenses arising from conventional packing, and is manufactured in a shape appropriate to both cargo and the vessel

equipment.¹¹⁶ Therefore, the carrier must make sure that the containers are in good condition, are able to withstand the hardships of the journey, and appropriate for the kind of goods which will be loaded into them.¹¹⁷ The carrier should be liable on the basis of the contract of supply of equipment.¹¹⁸ In recent years, holding the carrier responsible for the seaworthiness of the containers on board, in fact, is not significantly larger than the level of responsibility that some carriers have already been prepared to take.¹¹⁹

Although containers can be owned or leased by the shipper, in which case he, almost inevitably, will take charge of concealing them. Often, however, containers are usually supplied by the carrier, means the latter own or lease them. Whoever the supplier, empty containers may also be concealed by a third party who will pack and load the containers at their own premises.¹²⁰ Needless to say that liabilities of the parties will be affected from such differences. (...).

¹¹⁶ If the carrier has effectively exercised due diligence, and he is able to prove this, then the risk for defects which could not be discovered is inevitably shifted to the cargo interest. At this moment in time, there is no established uniform liability standard in multimodal transport. The multimodal transport operator's liability is, at present, always determined according to the rules of either some unimodal transport convention or some domestic legal system which happened to be applicable to a given case, or in the case of unlocalised loss or damage under a modified network system which is governed by the rules agreed between the parties which is usually limited in nature. See De Wit, R. *Multimodal Transport* (LLP, 1995) at pp.399 and 417

¹¹⁷ Tetley, W. *Marine Cargo Claims* Montreal: International Shipping Publications at p.647. Also see De Wit, R. *Multimodal Transport* (LLP, 1995) at pp.413-414

¹¹⁸ The issue of the legal nature and regime of supplying of containers has been already given rise to litigation under different jurisdictions. See *Shanghai Maritime Court in Zhejiang Branch of Chinese People's Insurance Co v Guangzhou Ocean Shipping Corp & Shanghai Branch of China National Foreign Trade Transportation Corp* [1994] Sup. Ct. LR, Issue 1. See also in District Court of Rotterdam in *NDAL v Premium Tobacco*, SCN : NJ 2008, 505 SES 2008, 46; 1 February 2008 (*The NDS Provider*); *American Supreme Court in Gutierrez v Waterman S.S. Corp* 373 US 20682, S. Ct. 1185, 1963 AMC 1649, 10 L. Ed. 2d 297; (USSC 1963). See French Supreme Court Cour de Cass (Ch Com) (5 mars 2002), *Navire Saint Georges - Sté CGM SUD v Sté Le Continent* - (N° de pourvoi: 99-12852) – in Legifrance: www.Legifrance.gouv.fr

¹¹⁹ See P&O Containers Bill of Lading 1989, Clause 17 (2): "The Carrier shall not be liable for any loss of or damage to the Goods arising from any defect of any specialised Container, provided that the Carrier shall, before and at the beginning of the Carriage, exercise due diligence to maintain the Container in an efficient state"

¹²⁰ Because the shipper may not have experience with stuffing containers or because the shipper's cargo, fills part of the container (LCL) or special cargoes may need special dunnaging stuffing, handling, care etc. See Talal Aladwani, "The Supply of Containers and 'Seaworthiness'- The Rotterdam Rules perspective", (2011) 42 JMLC, at p.185, at p. 187; Frank Stevens, "Liability for defective containers: charting a course between seaworthiness, care for the cargo and shipper liabilities", at p. 2, presented at Eighth Annual International Colloquium on Carriage of Goods- Sea Transport and Beyond, 6-7, Sept. 2012, Swansea University.

If it was approved that the container forms part of the superstructure of the vessel; or if it is considered as equipment¹²¹ as under Article III r.1 (b) of the Hague/Hague-Visby Rules; or if the carrier was the owner of the container, the use of the container therefore may have an impact on the carrier's responsibility for due diligence in ensuring that the vessel is seaworthy.¹²² Liability from unseaworthiness of a container may make the carrier liable to the charterer or the cargo owner.

Possible solutions on the carrier's duty to provide a seaworthy container

a) Container as part of the vessel's superstructure and seaworthiness

It is an arguable topic whether the container forms part of the vessel's superstructure. In practice, it may be true that there are only two specific standards of containers in size which does make it easier for any container vessel to use any containers to load the vessel. It is known that the vessel can be navigated and run by any competent certified officers and in no case that a particular officer or master is required to run a vessel. Such analogy can be used to strengthen the view that containers may form a part of the vessel without the conceptual of being specific to the vessel. Nonetheless, containers may well be regarded as part of the vessel if the container vessel is deckless or a "non-cellular container vessel"¹²³ where containers are being used not merely to accommodate cargo, but to secure other containers when stacking them vertically; thereby, it could be presumed that container vessels cannot perform her duty of loading, stowing, securing and lashing on board without the use of containers, which may form a basis of liability with regard to unseaworthiness of the container vessel if the defect of the container seized the proper stowage of other containers and imperilled the safety of the vessel.¹²⁴ Some observers consider that the container should be

¹²¹ The view here is when the duty contained in Article III (1) extends to containers. Where the carrier in this case cannot contract out because exercise due diligence is not delegable

¹²² Article III of the HVR requires a carrier to exercise due diligence before and at the beginning of a voyage to make the ship seaworthy including a properly equipped and fully supplied vessel, ensuring that the holds, refrigerating systems and cool chambers and all other parts of the ship to which goods are carried, fit and safe for the reception, carriage and preservation of cargoes

¹²³ This is a custom-built vessel for the carriage of containers. The containers are loaded one on top of the other and guided into position by the means of vertical guides at each corner of the container. The guides are part of the vessel for the purpose of joining the containers to the vessel's structure. See Bugden, P. and Lamont-Black S. (2010) *Goods in Transit*, 2nd edn. Sweet & Maxwell at p.375

¹²⁴ Bugden says: "At least to some extent the liability may arise when the carrier may have a liability for design faults in the ship leading, for example, to unacceptable strains

treated as part of the vessel.¹²⁵ The purpose of using containers is paralleled to the purpose of the tank on an oil tanker or it might be regarded as a cargo hold similar to the hold of a bulk carrier. Knowing that it is clearly a receptacle for the carriage of cargo, containers play a great role in the transportation of cargo as without them the execution of the contract of carriage by a container vessel is impossible and their defects are likely to cause damage to the cargo or to an extent of endangering the safety of the vessel or her crew.¹²⁶

Furthermore, it follows under different legal systems¹²⁷ that the container, if it is supplied by the carrier, should be deemed as part of the vessel within the meaning of Article III r.1 (c), that is, “other parts of the ship in which goods are carried” which consequently imposes an obligation on the carrier to exercise due diligence to provide a seaworthy vessel. Such a solution was concluded by the Supreme Court of the Netherlands in *The NDS Provider*. The court held that if the container was supplied or owned by the carrier, it should be cargoworthy and therefore the obligation to exercise due diligence as per Art III r.1 of the Hague/Hague-Visby Rules applies to the container as well.¹²⁸ This view implies a duty on the carrier to ensure that the containers are not only suitable to carry the inside cargo, but it also imposes a duty to provide a container that is safe to be carried and does not endanger the safety of the vessel or its crew by way of the container’s fitness as well as the suitability of the container to carry

upon the container lashing gear and immersion of the deckage at a relatively low angle of roll with consequent risk to the container stacks.” Bugden, P. (2002) *The Supply of Containers and Seaworthiness* Accessed at www.forwarderlaw.com/feature/conworth.htm

¹²⁵ Bugden, P. (2002) *The Supply of Containers and “Seaworthiness* Accessed www.forwarderlaw.com/feature/conworth.htm; Bugden, P. and Lamont-Black, S. (2010) *Goods in Transit*, 2nd edn. Sweet & Maxwell at p.375. For the opposed view that containers should not be considered part of the vessel, see Margetson, N. J., “Liability of the carrier under the Hague (Visby) Rules for cargo damage caused by unseaworthiness of its containers”, (2008) JIML, p. 153-161; See Bordahandy, P-J. (2005) Containers: a conundrum or a concept? 11 JIML, pp.342-371 at p.369

¹²⁶ In relation to latent defects in containers see Article IV r.2(p) of the Hague Visby Rules; which exception is most likely to relate to cargo handling gear and equipment which are not considered to be part of the vessel such as shore or floating cranes and containers. See Treitel and Reynolds, Carver’s on Bills of Lading, (2001, Sweet and Maxwell), at p.511.

¹²⁷ *Shanghai Maritime Court in Zhejiang Branch of Chinese People’s Insurance Co v Guangzhou Ocean Shipping Corp & Shanghai Branch of China National Foreign Trade Transportation Corp* [1994] Sup. Ct. LR, Issue 1. See also in District Court of Rotterdam in *NDAL v Premium Tobacco*, SCN 1 February 2009, C06/082 HR, (*The NDS Provider*), *American Supreme Court in Gutierrez v Waterman S.S. Corp* 373 US 20682, S. Ct. 1185, 1963 AMC 1649, 10 L. Ed. 2d 297; (USSC 1963)

¹²⁸ SCN 1 Feb 2008, nr. C06/082HR, published in RvdW NJ 2008/505 1 Feb. 2008, 177 (*The NDS Provider*)

dangerous cargo.¹²⁹ The fitness of the container is important to withstand the maximum loads of containers, otherwise the unfitness of the container will render the container unsafe and if it collapses the result will endanger the stability of the vessel when the cargo becomes unevenly distributed. Such problems are believed to be eliminated only by the duty of due diligence to supply a suitably fit container. In some jurisdictions,¹³⁰ there is little doubt that the context of the Hague/Hague-Visby Rules imposes a duty to exercise due diligence to make sure that unsuitable containers are not loaded on board as part of the seaworthiness obligation. For example, in *Houlden & Co v Red Jacket*¹³¹ case, the carrier was responsible when a defective container loaded with tinned fish collapsed during a storm losing 50 stow of containers. The court held¹³² that the carrier had failed to exercise due diligence to make the vessel seaworthy. In addition, the carrier had failed to provide a fit container because the collapsed container was old and prior to loading, a visible inspection indicated some defects of the container. In many circumstances, cargoes may be damaged by seawater due to the presence of holes as a result of rusting.¹³³ However, in the same circumstance, the safety of the vessel may be endangered if the cargo was stowed inside with a dangerous cargo which had broken packing,¹³⁴ if that reacted with seawater it could result in an explosion. Hence, the carrier must protect themselves by adding in the bill of lading a clause¹³⁵ that concerns the liability of specialised carriage, such as a dangerous cargo container or a

¹²⁹ In brief, it requires the containers to be designed and structured by a competent authority, similar to a classification society. Further information see Luddeke, C., *Marine Claims - A guide for the handling and prevention of marine claims*, 2nd Ed. (LLP), p.158. Containers themselves should be structured in compliance with the Container Safety Conventions (CSC)

¹³⁰ *Houlden & Co. v. S.S. Red Jacket*, 1977 AMC page 1382, which decides that the standard of seaworthiness applies to "all of the ship's equipment, including containers supplied to the shippers" (at page 1401). As to European legal theory on this subject, see respectively Lebuhn and Auren in the Norwegian maritime publications "Arkiv for Sjørett" No. 8 (1966), page 520 and "Marlus" No. 212 (1995), page 61. Reference is also made to the French decision in DMF 1983 page 531 (at page 539) which concluded that latent defects in the "ship" should be interpreted to include latent defects in containers supplied by the carrier. The decision was later upheld: DMF 1986, page 208.

¹³¹ *Houlden & Co v S.S. Red Jacket* [1977] AMC 1382 (SDNY, 1977), [1978] 1 Lloyd's Rep. 300

¹³² Although the shipper had caused the tinned fish to be stowed in a negligent manner, this was not the proximate cause of the loss and damage. "The Court, therefore, cannot find that improper stowage of the ingots in container CMLU 122590 was a proximate cause of the loss and damage to plaintiffs." at pp.308 and 311. As per Motley, D. J.

¹³² *NDAL v Premium Tobacco*, SCN 1 Feb 2009, C06/082HR (*The NDS Provider*) NJ 2008/505.

¹³³ Close observation of loading/unloading operation may provide good indications to holes or defects.

¹³⁴ For tank containers, small holes, malfunctioned valves or sealant allow the hazardous gases contents to escape and create dangerous or flammable air mixture.

¹³⁵ P&O Containers Bill of Lading 1989, Clause 17 (2): "The Carrier shall not be liable for any loss of or damage to the Goods arising from any defect of any specialised Container, provided that the Carrier shall, before and at the beginning of the Carriage, exercise due diligence to maintain the Container in an efficient state"

refrigerated container which will exclude liability for latent defects of a container, provided however that the carrier has exercised due diligence before and at the beginning of the carriage in order to provide suitable seaworthy container.¹³⁶

b) Container as equipment

Even if the container that is supplied by the carrier was not presumed to be part of the vessel's superstructure, it might be deemed part of the carrier's obligation in exercising due diligence to provide a seaworthy vessel within the meaning of Article III r.1 (b) "Properly man, equip and supply the ship." Therefore, using an analogy to other equipment that is deemed necessary for the vessel's seaworthiness, i.e. vessel's derrick or cranes, it leads to a conclusion that the carrier has a duty to exercise due diligence on containers to provide a seaworthy vessel, and the failure to "properly equip" the vessel with suitable containers could amount to a breach of exercising due diligence to provide a seaworthy vessel,¹³⁷ especially if the equipment is not rigidly connected to the vessel's structure and does not form part of the vessel.¹³⁸ For example, dunnages, shifting-boards or spare parts are often used on board a vessel and their presence with correct order and condition is important; however, on the contrary, they might account to unseaworthiness of the vessel. Due to the design of the vessel, this equipment can be dismantled for maintenance or even to provide more space for cargo to be loaded.¹³⁹ Dunnages, for instance, do not form part of the vessel, and are not kept on board the vessel that often unless a specific cargo is to be loaded

¹³⁶ For more information, see Glass, D. Freight Forwarding and Multimodal Transport Contracts (*Informa*, 2002), para. 4. 93

¹³⁷ *The Kamsar Voyager* [2002] 2 Lloyd's Rep. 57. Failure to supply the proper piston for a main engine amounted the vessel to be unseaworthy

¹³⁸ In relation to latent defects in containers, see Article IV r.2 (p) of the Hague Visby Rules; this exception is most likely to relate to cargo handling gear and equipment which is not considered to be part of the vessel such as shore or floating cranes and containers. See Bugden, P. and Lamont-Black, S. (2010) *Goods in Transit*, 2nd edn. Sweet & Maxwell at p.375. Margetson argued that the container should not be part of the vessel because it might spend more time ashore than on board the vessel

¹³⁹ *Ismail v Polish Ocean Lines (The Ciechocinek)* [1976] QB 893. The plaintiff chartered the defendants' ship to carry potatoes from Egypt to England. The ship's master considered that although the cargo capacity was 1,400 tonnes, only 1,000 tonnes of potatoes should be carried and should be ventilated by dunnage. The charterparty provided that the stowage and dunnage instructions of the charterer were to be carefully followed and be executed under the supervision of the master who was to remain responsible for proper stowage and dunnage. The charterer's agent in Egypt, notwithstanding the master's advice, insisted that the ship should carry 1,400 tonnes of potatoes and expressly stated that the potatoes were so packed as to make dunnage unnecessary. The charterer had, by his agent, accepted responsibility for the stowage and had thereby relieved the master of the responsibility under the charterparty. See also *Claude Bouillon et Cie v Lupton* (1863) 15 Common Bench Reports (New Series) 113

which by international regulations imposes the shipowner to use them for safe stowage. A similar example can be found in *The Standale*,¹⁴⁰ the owner was guilty as the court held that the vessel was unseaworthy in terms of it not being adequately fitted for carriage of cargo by not using dunnage or shifting-boards.¹⁴¹

c) Containers owned by the carrier and seaworthiness

As mentioned above, the carrier most often is the supplier of the container either by leasing or owning the container¹⁴²; either way the carrier is under obligation imposed by the Hague/Hague-Visby Rules. The carrier, under Article III r.1 is required to make the vessel seaworthy by exercising due diligence in properly equipping and supplying the vessel, and making the holds, refrigerating systems and cool chambers including the entire parts of the vessel in which goods to be carried, fit and safe to carry and preserve the contemplated cargo. Tetley¹⁴³ says that where containers are furnished by the carrier, due diligence has been held to extend to them as parts of the vessel's seaworthiness. Also, the authors¹⁴⁴ of the recent edition of *Goods in Transit* comment that the seaworthiness of a container ship clearly depends on, *inter alia*, the condition, weight and contents of each container being properly described by the merchant in each case. No stowage plan is otherwise reliable to render the vessel seaworthy. Indeed, if a tank container carrying a dangerous cargo is damaged, such as having a wrong setting safety relieve valve or a cracked shell which may cause an explosion, will obviously render the vessel unseaworthy.¹⁴⁵ It would be therefore imprudent to exercise due diligence on every part of the vessel and single out any container that may

¹⁴⁰ *The Standale* (1938) 61 LIL Rep. 223 at p.230

¹⁴¹ Out of three thousand two hundred tonnes of grain, a portion was stowed in five thousand bags without separation. Consequently, the cargo shifted, the vessel developed a list and became unmanageable; it sank

¹⁴² According to Article IV 4 of the International Convention for Safe Containers (CSC Convention), "every container shall be maintained in a safe condition." Regulation 2 of the Annex I places this obligation on the owner of the container, who must "examine it or have it examined in accordance with the procedure prescribed or approved by the contracting party concerned, at intervals appropriate to the operating conditions."

Annex II deals with safety aspects of the construction and testing of containers

¹⁴³ Tetley, W. (2005) *Marine Cargo Claim* 4th edn. Montreal Canada Ch. 15 www.mcgill.ca/maritime law

¹⁴⁴ Bugden, P. and Lamont-Black, S. (2010) *Goods in Transit*, 2nd edn. Sweet & Maxwell at p.375

¹⁴⁵ Each time a container is transferred from one carrier to another, or to a storage company, a so-called interchange receipt will be drawn up between the two transferring parties, by means of a printed drawing on which the location of dents, holes and other damages which may render the container unfit for carriage, such as badly functioning door mechanisms, can be easily indicated. The number on the containers seal is also noted. For further information, see De Wit, R. *Multimodal Transport* (LLP, 1995) at p. 10

endanger the vessel and life apart from the expected normal perils of the sea. There is no doubt that the carrier is not required to exercise due diligence by inspecting and opening every container, but it might be made by other framework; for example, weighing the container and verifying the shippers' declarations which extends to the security of the container while it is being scanned or x-rayed according to the requirements of the ISPS Code.¹⁴⁶ A similar example was found in a case of a refrigerated container filled with chocolates and was being shipped from the factory in Switzerland to Hong Kong via France. On arrival at France, the handling company found that the container's temperature was 23°C rather than the suitable one of 12°C. The cargo was found, when examined, to be damaged due to a latent defect in the refrigeration system. The carrier, as a supplier of the container, was found to be liable for the defect.¹⁴⁷

The extent of obligation of seaworthiness alters the overall risk allocation between the carrier and cargo interests and is totally right.

First, the checking of the containers cannot be considered to be the consignor's duty. Even a normal thorough investigation of the containers by the consignor would have revealed the unfitness¹⁴⁸ of the container, but then neither an inspection of the carrier would have discovered it. In this regards, the carrier might not be negligent in supplying such unfit containers. It is in such cases that an objective liability rule for equipment would prove very useful. Second, whether or not the consignor is under the obligation to check the container, this cannot be held has an exception against a third party holder of a negotiable document who may rely on the carrier for the performance of certain essential duties such as the use of fit equipment (cargoworthy container).

However, the exact nature of the due diligence required by the ship (carrier) in the case of container carriage in this respect has never been explored in the cases under the English Law; no doubt it would not extend to requiring opening up and checking of contents of sealed containers in the ordinary way but it might extend to taking other proper steps to verify the shipper's declarations by checking the declared gross weights and the exterior appearance of the containers for defects which involves the security of the stow which, in turn, might render the vessel unseaworthy if it has not been carried out.

¹⁴⁶ The ISPS Code imposes security-related responsibilities on governments, port authorities and shipping companies. Security of ships and port facilities is seen as a risk management activity. See Todd, P. (2005) *ISPS clauses in charterparties* JBL 372

¹⁴⁷ Aix-en-Provence, 31 May 1990, BT, 1990. 663 (summary); Paris, 14 November 1984, DMF 1986, 282. Cited in De Wit, R. (1995) *Multimodal Transport*, LLP at p.414

¹⁴⁸ A case where tinned cargo was damaged through 'microholes'. Versailles, 16 June 1988, DMF, 1989, 465 with note; BT, 1989, 145 with note

If the container is supplied by the shipper, the carrier should still be under an obligation to assess the apparent order and condition and, if necessary, insert a reservation to that effect in the transport document which, in return, the shipper will replace the container. If he did not do so, he will be apparently liable for any future cargo damage.¹⁴⁹

The need for a new system - the legal position of the container in Rotterdam Rules

The Rotterdam Rules are structured to be applied to a multimodal transport shipment as a contract of carriage involving at least one international sea leg.¹⁵⁰ It was said that the draft instrument should respond to the new realities of international transport,¹⁵¹ namely, the increase in door-to-door containerised transport in the liner trade which in June 2002, the UNCITRAL Commission approved this suggestion.¹⁵² There was the development in world trade, technological advancement in the shipping industry owing to improved navigational instruments, more efficient steam power and steel during the nineteenth century, but there was more development on the way with the transshipment of cargo and packages such as containers; these were invented for the consolidation of goods. During this period, it was widely recognised that the Hague/Hague-Visby Rules caused confusion and insoluble problems because of their deficiencies and insufficient language communication,¹⁵³ and could not keep up with the developments in shipping and commerce, which had not been apparent even during the fifth session of the Brussels Diplomatic Conference.¹⁵⁴

The obligation of seaworthiness is contained in Article 14 of the Rotterdam Rules:

Article 14: Specific obligations applicable to the voyage by sea

¹⁴⁹ Which would also be apparent in the container interchange receipt which is normally made out upon delivery to a container terminal

¹⁵⁰ Article 1.1 “contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in an addition to the sea carriage

¹⁵¹ Hancock, C. ‘Multimodal transport under the Convention’ as chapter 2 in R. Thomas (ed.) *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules* 2009, Law text

¹⁵² Report of ninth session A/CN.9/510 para 224

¹⁵³ Todd, P. *Modern Bills of Lading* 2nd ed., London 1990 at p.139

¹⁵⁴ Moore, J. C. *The Hamburg Rules* 10 J. Mar. L. & Com. 1, October 1978, p.3

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

(a) Make and keep the ship seaworthy

(b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage

(c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

Article 14 of the Rotterdam Rules sets out fundamental obligations of the carrier in terms of the vessel, and now corresponds to the Hague-Visby Rules, Article III. r. 1; in addition to further provisions. A general statement, however, preceded Article 14, similarly considered in Article III of the Hague/Hague-Visby Rules, with an additional phrase - 'during' - that constitutes the general frames of within which the rules on the obligation of the carrier is to be continued to the entire period of the voyage. Furthermore, they are quoting Article III r. 1 of the Hague/Hague-Visby Rules regarding the obligation of seaworthiness on the carrier to exercise due diligence to provide a seaworthy vessel; that is to say, a vessel must be prepared in a condition to a vessel similar to her kind, and loaded in such a way similar to the way she was loaded in order to encounter a peril of a particular area of the sea.¹⁵⁵ In other words, a vessel's seaworthiness is said to be relative to the adventure and not necessarily determined by a fixed standard, but will depend on a number of factors in particular: the type, characteristics and age of the vessel; the contemplated cargo; the contemplated area of globe; the time of year at which the carriage will be effected; and perhaps also, to the state of knowledge or development of the industry at the time of the obligation.¹⁵⁶ The aspect of seaworthiness in Article 14 coincides with the one under Article III r. 1 of the Hague/Hague-Visby Rules. Seaworthiness under Article 14 encompasses three factors of seaworthiness: 1) under the provision of Article 14(a) - the vessel's physical

¹⁵⁵ *Steel v State Line Steamship Co* (1877) LR 3 App. Cas. 72 at p.77. See also *McFadden v Blue Star Line* [1905] 1 KB 697 at p.706 (Scrutton LJ), setting the classic test of whether or not a vessel is in fact seaworthy; a vessel 'must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. ... if the defect exists, the question to be put is: "Would a prudent owner have required that his hold be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking."

¹⁵⁶ *Eridania SpA (formerly Cereol Italia Srl) v Oetker (The Fjord Wind)* [1999] 1 Lloyd's Rep 307 at p.315 (Moore-Bick LJ), approved by Clarke LJ at [2000] 2 Lloyd's Rep 191 at p.197

condition requires to be fit in terms of her hull plating,¹⁵⁷ hatches,¹⁵⁸ port holes¹⁵⁹ and vents,¹⁶⁰ to encounter the expected peril of the sea; 2) under Article 14(b) - the shipowner is also required to properly man the vessel. For example, the vessel must be supplied with sufficient numbers¹⁶¹ of crew and officers in accordance with national manning scales.¹⁶² The crew must also be properly qualified, competent¹⁶³ and well instructed and trained to be familiar with their vessel.¹⁶⁴ In addition, the shipowner is required to properly equip the vessel with all necessary spare parts,¹⁶⁵ up-to-date charts, navigational equipment and publications¹⁶⁶ in addition to supplying the vessel with adequate¹⁶⁷ and suitable bunkers to navigate her to the contemplated destination

¹⁵⁷ *The Toledo* [1995] 1 Lloyd's Rep 40 (unseaworthiness due to failure of shell plating of the hull on the port side); see also *The Christel Vinnen* [1924] P 208; (1924) 19 LIL Rep 272 (when a missing rivet from the vessel's hull allowed water to leak into the hull and damage the cargo which made the vessel unseaworthy)

¹⁵⁸ *Kamilla Hans-Peter Eckhoff KG v AC Oerssleff's EFTF A/B* [2006] EWHC 509 (Comm) [2006] EWHC 509. (the vessel was found to be unseaworthy when the cargo was damaged due to a defected hatch cover, the port authority refused to allow the cargo to be discharged)

¹⁵⁹ *Steel v State Line* (1877) 3 App Cas 72 at pp.90-91 (vessel found to be unseaworthy as one of the deck portholes was inadequately fastened)

¹⁶⁰ *Albert E Reed and Co Ltd v Page, Son and East Ltd* (1927) 32 Com. Cas. 243 at p. 255 CA (Scrutton LJ)

¹⁶¹ *Forshaw v Chabert* (1821) 3 Brod & Bing 158 (it was held that the vessel, in order to be seaworthy, must have a sufficient number of crew for the whole voyage at the commencement thereof); see also *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hong Kong Fir)* [1961] 1 Lloyd's Rep 159

¹⁶² International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 as amended 1995 (STCW 95)

¹⁶³ *Robin Hood Flour Mills Ltd v N. M. Paterson & Sons Ltd (The Farrandoc)* [1967] 1 Lloyd's Rep. 232 (Thurlo J) (the vessel held to be unseaworthy because the engineer was incompetent for not being familiar with this particular vessel)

¹⁶⁴ *Standard Oil Company v Clan Line Steamers* [1924] AC 100; (1924) SC 1 (the vessel was unseaworthy because the owner had failed to instruct the master about the information from the shipyard regarding the vessel's operation); see also *Papera Traders Co Ltd and Others v Hyundai Merchant Marine Co Ltd and Another (The Eurasian Dream)* (No.1) at pp.740-744. (Cresswell LJ) (incompetent master and crew because they were not properly instructed and trained in fire fighting)

¹⁶⁵ *Guinomar of Conakry v Samsung Fire & Marine Insurance Co Ltd (The Kasmar Voyager)* [2002] 2 Lloyd's Rep 57 (Dean J) (the vessel was found unseaworthy for inadequate spare-parts, i.e. wrong supply of the main engine's piston)

¹⁶⁶ *Rey Banano del Pacifico CA v Transportes Navieros Ecuatorianos SpA (The Isla Fernandina)* [2000] 2 Lloyd's Rep. 15 at p.40. (The vessel found unseaworthy due to inadequate charts and navigation aids and equipment); see also *The Marion* [1983] 2 Lloyd's Rep. 156 (CA) and [1984] 2 Lloyd's Rep. 1 (HL)

¹⁶⁷ *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep. 177. Although, there is a breach of exercise due diligence to tender the tug at the commencement of the voyage in a seaworthy condition by supplying sufficient bunker, the fact was that the defendants were protected from liability by Clause 18 (exemption clause); see also *Northumbrian Shipping Co Ltd v E. Timm & Son Ltd.*, [1939] AC 397 at 404 (Wright LJ)

or to an agreed convenient bunkering port.¹⁶⁸ Furthermore, the overall legal requirement to properly equip and supply includes all the necessary certifications to enable the vessel to perform her duty (legally seaworthy);¹⁶⁹ and 3) seaworthiness under Article 14(c) also relates to the fitness of the vessel in relation to the space and all other parts that goods are carried which must be cargoworthy; that is to say, prior to the loading operation, holds, tanks and all cargo spaces are to be fit to receive and carry the contemplated cargo to the contracted destination safely.¹⁷⁰ Therefore, cargo holds must be cleaned, fumigated and free from residual of the previous cargo to avoid smearing the goods¹⁷¹ or preventing the cargo from being denied to be unloaded at the port of unloading.¹⁷² Equally, the stowage of cargo must be properly made in the sense that it would not shift or break as to endanger the safety of the vessel.¹⁷³

One of the most essential aims of the Rotterdam Rules is to provide practical tools to update the transport law in order to solve problems¹⁷⁴ that are occurring from the fast growing industry.¹⁷⁵ Thus, unlike the Hague/Hague-Visby Rules, the Rotterdam Rules take into consideration the usage of containers which was adverted following the Hague Conventions. The provision of Article 14(c) also requires that a seaworthy

¹⁶⁸ *Nippon Yusen Kaisha v Alltrans Group of Canada Ltd* QBD (Com.Ct.) (Neill J.) 12 Apr (1984) 116 LMLN 3(3)

¹⁶⁹ *Golden Fleece Maritime Inc and Pontian Shipping SA v ST Shipping & Transport Inc* [2008] 2 Lloyd's Rep. 224 (vessel held to be unseaworthy due to a change in MARPOL regulation which required the vessel to make major modifications to her tanks in order to be granted with certification); see also *Alfred C Roepfer v Tossa Marine Co Ltd (The Derby)* [1985] 2 Lloyd's Rep. 325 at p.331. (Lord Kerr)

¹⁷⁰ *Queensland National Bank Ltd v Peninsular and Oriental Steam Navigation Co* [1898] 1 QB 567, at p.572 (Collins LJ) (The vessel was found to be unseaworthy because the bullion room was not reasonably fit for its purpose to resist thieves)

¹⁷¹ *The Brabant* [1965] 2 Lloyd's Rep. 546; see also *The Good Friend* [1984] 2 Lloyd's Rep. 586

¹⁷² *The Fehmarn* [1964] 1 Lloyd's Rep 355. (Sir Jocelyn Simon, P.); see also *International Ore & Fertilizer Corp v SGS Control Services Inc* - US Court of Appeals (2nd Circuit) (Van Graafeiland and Winter Ct JJ and Mishler DJ) - 24 October 1994. For more information, see Shaw, R. E. *Cleaning bulker cargo holds* Maritime Risk International (2001) May

¹⁷³ *Onego Shipping & Chartering BV v JSC Arcadia Shipping (The M/V Socol 3)* [2010] EWHC 777 (comm.) (the vessel found to be unseaworthy due to improper securing of the deck cargo, lashing haD broken loose); see also *Kopitoff v Wilson* (1876) 1 QBD 377 (Blackburn J.) (The cargo of armour plates due to improper stowage broke loose in rough weather causing the vessel to sink)

¹⁷⁴ See generally Levinson, M. *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger* (2006) (discussing the impact of the container revolution); Cudahy, B. J. *Box Boats: how container ships changed the world* (2006)

¹⁷⁵ Sturley, M. F. Transport Law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules at p.26 as Chapter 1 in R. Thomas (ed.) *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules* (2009, Law text)

container has to be supplied by the carrier for the use of the carriage of goods.¹⁷⁶ By analogy to the cargo holds and all other parts of the vessel that are required to be seaworthy, Article 14(c) so too obliges that all containers supplied by the carrier are to be seaworthy in the same way as any hold or part of the vessel. Despite the fact that the Hague/Hague-Visby Rules had made no reference to containers, Article 14(c) thereby pertains to the approach of other jurisdictions¹⁷⁷ which imposes the carrier to exercise due diligence to supply a seaworthy container.¹⁷⁸ In other words, the carrier will be liable for not exercising due diligence in providing a cargoworthy container if it is found that the container was unfit at the reception of, the carrying of and the preservation of the contemplated cargo, i.e. if the refrigeration system of the container does not work properly, this may cause the cargo to be damaged.¹⁷⁹ On the other hand, the uncargoworthiness of the container may affect the whole fitness of the vessel if it is found that such a container may endanger the whole safety of the vessel and not merely the carrying of an unfit cargo.

As a final note, other mandatory liability regimes (including that of the Multimodal Convention) have made it impossible for the parties of a contract to shift the duty of inspection, cleaning and maintenance of containers to the consignor rather than the carrier as it does not give a freedom of contract to contract out of the regime. Such an exemption clause would discharge the carrier of a fundamental duty under the contract of carriage. On the contrary, a volume contract¹⁸⁰ under the Rotterdam Rules sorts out problems of contract freedom for those who see it as more convenient to their business

¹⁷⁶ If the containers are supplied by the shipper or documentary shipper, then they will fall into the definition of the goods (Containers not supplied by or on behalf of the carrier' - Article 1. 24). See also Articles 27 and 33 on the liability of the shipper with respect to the condition of the goods

¹⁷⁷ US case for example, see *Houlden & Co v The Red Jacket* [1977] AMC 1382 at pp.1401-1402 (SDNY, 1977), [1978] 1 Lloyd's Rep. 300; Netherland case for example, see *The NDS Provider* (SCN 1 February 2008) nr C06/082HR, RvdW 2008, 177 (Netherland)

¹⁷⁸ See Tetley, W. *Marine Cargo Claims* (Thompson 2008) Chapter 15 at pp.921-922; see also Margetson, N. J. *Liability of the carrier under the Hague (Visby) Rules for Cargo Damage caused by unseaworthiness of its Containers* (2008) 14 JIML 153; see also Margetson, N. J. *The system of liability of Articles III and IV of the Hague [Visby] Rules* Paris Legal Publishers, 2008, para. 99 at p.48; also see Bordahandy, P-J. (2005) *Containers: a conundrum or a concept?* 11 JIML, pp.342-371 at p.369

¹⁷⁹ Aix-en-Provence, 31 May 1990, BT, 1990. 663 (summary); Paris, 14 November 1984, DMF 1986, 282. Cited in De Wit, R. (1995) *Multimodal Transport*, LLP at p.414. also see *Houlden & Co v The Red Jacket* [1977] AMC 1382 at pp.1401-1402 (SDNY 1977), [1978] 1 Lloyd's Rep. 300

¹⁸⁰ Volume contracts are defined in Article 1.2 as contracts of carriage that provide for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or certain range

plan and relationship to keep adhering to the previous regimes,¹⁸¹ i.e. Article III (1) of the Hague/Hague-Visby Rules, by derogation from most provisions of the Rotterdam Rules provided that the preconditions set out in Article 80.2 are fulfilled except, of course, the obligation of seaworthiness under Article 14,¹⁸² including other provisions.¹⁸³ The carrier and the shipper (consignor) cannot be contracted out from them when they decide to enter into a volume contract. Although the carrier cannot contract out of the obligation of seaworthiness, he must exercise due diligence in making and keeping the ship so properly crewed, equipped and supplied throughout the voyage. However, the parties are allowed to derogate from exercising due diligence as under Article 14 (c) in the making and keeping of the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried that are fit and safe for their reception, carriage and preservation.¹⁸⁴

It is not necessarily the case that the extension of seaworthiness in light of containers will find acceptance by the entire industry. Thence, contracting in with a volumes contract is believed to give some flexibility in retaining some form of business between shippers and carrier especially those that are set out over a long relationship based on provisions of an older regime or convention. Nonetheless, the 'utmost responsibility' provisions of seaworthiness obligation in Article 14 (a) and (b) is believed to relate to

¹⁸¹ The parties to a volume contract may derogate from most of the provisions of the Rotterdam Rules if the preconditions set out in Article 80.2 are met. The derogation is allowed as the parties to volume contracts are deemed to have equal bargaining power and, therefore, they are not in need of the mandatory protection of the provisions of the Rotterdam Rules

¹⁸² Article 80 (4) paragraph 1 of this article does not apply to rights and obligations provided in Article 14, subparagraphs (a) and (b), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in Article 61

¹⁸³ Carrier and shipper cannot also derogate from shipper's obligation to provide information, instructions and documents (Article 29), the special rules in dangerous goods (Article 32) and the liability arising from the breach thereof, as well as from the unlimited liability of the carrier of any of the persons referred to in Article 18, in cases where the claimant proves that the loss resulting from the breach of the carrier's obligation under the Rotterdam Rules was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result (Art 61)

¹⁸⁴ For further information, see Theodora Nikaki, *The Obligation of carriers to provide seaworthy ships and exercise care*, cited as chapter 4 in D Rhidian Thomas, *A New Convention for the Carriage of Goods by Sea-The Rotterdam Rules*, (2009, Lawtext Publishing Limited), at p. 108-109.

maritime safety which should be carefully monitored at all times.¹⁸⁵ It should be borne in mind that the derogation of provision that corresponds to the cargoworthiness of the vessel and containers does not bind third parties or subsequent holders, other than shipper, of an 'electronic transport record or negotiable transport document' unless they receive information that clearly states the derogation of the volume contracts from the Rotterdam Rules with their express approval to be bound by such a derogation.¹⁸⁶

Period of seaworthiness

Despite the similarity in the basis of the obligation between Hague/Hague-Visby Rules and Rotterdam Rules in the sense that the obligation of seaworthiness,¹⁸⁷ unlike the absolute warranty under the common law, it is merely a duty to exercise due diligence in providing a seaworthy vessel. But the difference is in the change to the obligation, which under the Hague/Hague-Visby Rules would require the carrier to exercise due diligence to make the vessel seaworthy. This has been extended. Under Article 14, the carrier is now under an obligation to exercise due diligence, not only 'before and at the beginning of the voyage', but also 'during' the voyage and not just to 'make' but also to 'keep' the vessel seaworthy. The carrier would thence be obliged to not only provide a seaworthy vessel merely before and at the beginning of the voyage but also be under an obligation to persistently keep the vessel in a seaworthy condition throughout the voyage by sea. The provision under Article 14 extends the duration of seaworthiness throughout the voyage without setting a clear limit in which the obligation is completely fulfilled. Since the case law has defined the duration of the obligation of seaworthiness under the Hague/Hague-Visby Rules, a hypothetical example to the Rules would give a clear picture as to when the obligation is starting. Definition of the words 'before and at the beginning of' the voyage' have been construed to correspond with the time starting when the vessel is under the 'orbit' of the carrier¹⁸⁸ to the phase when the loading

¹⁸⁵ A/CN.9/576 - Report of Working Group III (Transport Law) on the work of its fifteenth session (New York, 18 - 28 April 2005) <http://daccess-ods.un.org/access.nsf/Get?Open&JN=V0584375>, para 22

¹⁸⁶ Rotterdam Rules Article 80.5. Provided that their consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.

¹⁸⁷ That means that even if the cause of unseaworthiness was not discoverable by due diligence, the carrier will still be liable. *The Muncaster Castle* [1961] 1 Lloyd's Rep. 57. See also *Steel v The State Line SS* (1877) LR 3 App Cas 72 at p.86 (Blackburn LJ)

¹⁸⁸ *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1961] AC 807 at p.867 (Radcliff LJ). When the new vessel is to be received from the shipyard or when the vessel had been repaired and comes under the control of the carrier. At p.870 (Keith of Avonholm LJ) see also *The Happy Ranger* at p.656 (Gloster J)

begins or until the vessel starts on her voyage.¹⁸⁹ The Rotterdam Rules are silent regarding how far the obligation should be maintained as the terms 'during the voyage' bring with it some doubt in the definition of the duration of the obligation and, in particular, the time that the seaworthiness obligation is concluded. This would cause unnecessary uncertainty in the law if the Rules were ratified. What is required of this provision, in practical terms, is that it should clearly define the precise point at which the duty of seaworthiness ends. The term 'during the voyage' without doubt has not clarified the position of whether the seaworthiness undertaken ends when the vessel has arrived to the port of discharge or when the completion of the cargo has been discharged. An example of how each of these two would happen will assist. On the one hand, if the seaworthiness obligation, under the meaning of the context, meant to be at the end of the vessel's arrival then the following propositions are possible and may raise a future conflict in regard to the ending of the obligation:

1. The vessel is possible to be called 'arrived' when she is within the geographical and legal area of the port in the sense commonly understood by its users. Accordingly, the obligation of seaworthiness may end at the time of entering the limit of such area.
2. Even in the above point, the vessel may not enter the port if the port authority has ordered her to stay outside this area; this would result in considering her 'not arrived' and the obligation to this time, presumably, should not be ended.
3. If the vessel is ordered to anchor at a place where vessels usually lie while waiting for a berth at that port, the carrier is probably required to keep maintaining the obligation of seaworthiness.

This view is in line with the approach adopted in the case law regarding the meaning of the voyage as the term 'voyage' covers the whole period from the loading port until the arrival of the vessel at its destination.¹⁹⁰

On the other hand, 'during the voyage by sea' terms might be interpreted as including the discharge of the cargo from the vessel. This would coincide with the purpose of the

¹⁸⁹ *Maxine Footwear Co v Canadian Government Merchant Marine* [1959] Lloyd's Rep. 105 at p.113 (Somervell of Harrow LJ). The Privy Council clearly indicates that the obligation is not merely to exercise due diligence at the beginning of the loading and at the beginning of the voyage, but during the whole period from beginning of loading until sailing

¹⁹⁰ *The Makedonia* [1962] 1 Lloyd's Rep. 316 at pp.329-330. "I see no obligation to read into the word 'voyage' a doctrine of stages, but a necessity to define the word itself. The word does not appear in the earlier Canadian Act of 1910. "Voyage" in this context means what it has always meant: the contractual voyage from the port of loading to the port of discharge as declared in the appropriate bill of lading

Rules as it is to prolong the duration of the obligation to the end of the sea- and port-venture(s).¹⁹¹

Justification to the extension of the seaworthiness obligation

It is worth noting that the principle of exercising due diligence at the commencement of the voyage only is, in fact, debatable.¹⁹² The principle to that is definitely undesirable nowadays since the adoption to improve safety and the environment has made it necessary to implement the developed requirements of safety; especially the one that was introduced by the International Safety Management Code regarding the safety of the vessel and the environmental protection during her operation. In particular, a proviso that entails an obligation to exercise due diligence only at the commencement of the sea voyage would not, however, been possible to adopt the Safety Management System,¹⁹³ to state the responsibility of the masters¹⁹⁴ or the maintenance procedures¹⁹⁵ for the vessel to maintaining her in a seaworthy state during the voyage which is required under the International Safety Management System. Thus, such a requirement is in clear conflict with the current law on the obligation of seaworthiness under the Hague/Hague/Visby Rules¹⁹⁶ whereas, the obligation under Article 14 is essential to bring it in line with the ISM Code.¹⁹⁷ If in the future, the Rotterdam Rules are adopted, the responsibility of the carrier in relation to the continuous duty of seaworthiness is not substantially greater than the level of responsibility that carriers have been prepared to accept in practice over the recent years; industry has, before now, been familiar with the maintenance of seaworthiness during the sea voyage either by the means of incorporating the charter's provisions requiring the vessel to have on-board certificates and documents required by any applicable law and to comply with all

¹⁹¹ See the same concerns expressed by Dr Theodora Nikaki: "The obligations of carriers to provide seaworthy ships and exercise care", as Chapter 4 in D. Thomas *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules*, (Law text, 2009), p.89 at p.107

¹⁹² It was debated in the International Law Association (ILA) in preparation of the Hague Rules in 1921.

¹⁹³ ISM Code Article 1.4

¹⁹⁴ ISM Code Article 5

¹⁹⁵ ISM Code Article 10

¹⁹⁶ Article III r.1

¹⁹⁷ The view was supported in UNCITRAL Doc A/CN.9/WG.III/WP.21 of 8 January 2002 'Transport Law-Preliminary draft instrument on the carriage of goods by sea' (Ninth session New York, 15 - 26 April 2002). <http://Daccessdds.un.org/doc/UNDOC/LTD/V02/501/49/PDF/v0250149.pdf?OpenElement>) Article 5 para 63

applicable conventions including¹⁹⁸ ISM and ISPS clauses, and if in breach of these the carrier will be liable.¹⁹⁹

There was no difficulty in exercising due diligence before and at the beginning of the voyage, but the question is: “Does the carrier face an unattainable task in fulfilling the obligation of seaworthiness throughout the sea voyage?”

Furthermore, in light of the recent developments in the sense of new communications and tracking systems of vessels, it has been made possible for the ship’s master to be aware of all cargoes loaded or to be loaded on the vessel and that information regarding all hazardous or dangerous cargoes are given beforehand to the ship’s captain to warrant the compliance with the port including the local and international regulations,²⁰⁰ SOLAS regulations (such as the ISPS Code), the IMDG Code regulations and the general regulations concerning the correct stowage of all cargoes loaded or to be loaded on board the vessel. Contravening these regulations would render the vessel unseaworthy.²⁰¹ It is believed that the Hague/Hague-Visby Rules in general and Article III r. 1 in particular reflects the business conduct of the early twentieth century when the technology standard was not available for vessels to be in communication with her owner (carrier) after her sailing.²⁰²

The objection raised is that the carrier cannot fulfil the obligation of seaworthiness during the voyage, or in any event cannot do so in the same manner as he could when the vessel is in port.²⁰³ In fact, the view is more correct to the contrary with a container vessel. With a short time spent in port, the quick turn-around for a container vessel makes it very difficult for the vessel’s staff to be involved with safe planning or the stowage of the containers which may cause a risk of imbalance. This would lead to the

¹⁹⁸ *Golden Fleece Maritime Inc. v St. Shipping & Transport Corp.* [2008] EWCA Civ 584. Two vessels have been chartered on the Shelltime form for the carriage of petroleum product oil. During the course of the charters, revisions to MARPOL Convention required all vessels to be double hulled. Although the vessels were both single hulled, in the absence of a double certificate, the vessels were not permitted to carry fuel oils. The Court of Appeal held that the owners were in breach of seaworthiness obligation

¹⁹⁹ Even in the case of the absence of such a clause, the carrier is liable if he is not complying with ISPS and ISM Codes as both are part of SOLAS Convention

²⁰⁰ ISPS Code Part A, S 8.4. regulate and improve the security of ships and ports

²⁰¹ See Rowbotham, M. *Introduction to Marine Cargo Management* (Informa, 2008) at p.204. see also, B. Soyer, *Warranties in Marine Insurance*, (2006, Cavendish), at p.62.

²⁰² The obligations of carriers to provide seaworthy ships and exercise care published as Chapter 4 in *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules* (2009, Law text) pp.89-110

²⁰³ See commentary on Draft Instrument, under Article 5.5, CMI Yearbook 2001, Singapore at p.551

vessel becoming too heavy, e.g. unstable. Stowing cargo incorrectly would create a risk; it's imperative to ensure that hazardous or dangerous cargoes are isolated from each other, especially when two kinds of IMDG Code class cargoes are located adjacent to each other. They may endanger the safety of the vessel and render her unseaworthy, as explained above. The ISM code has imposed responsibility on the master concerning the planning and stowage of the cargo that cannot be made without monitoring the seaworthiness of the vessel prior to the vessel's arrival at the loading ports. In the *Annabella*²⁰⁴ case for example, a short-sea container feeder vessel was sailing en route to the port of Helsinki for further loading of containers. She encountered heavy seas which resulted in severe rolling. It was found that the 30-foot containers stowed lower down had collapsed under the excessive weight of the upper containers. At a later stage, it was discovered that no account had been made on the stowage of the 30-foot containers. Due to the reliance on the charterer who was in charge of the loading plans, the carrier had no interest in receiving or checking the plans. By so doing, the master or the chief mate was unable to consult the plan and make any alterations necessary to prevent the vessel from being unseaworthy at the commencement and during the sea voyage. A report from the Marine Accident Investigation Branch (MAIB) had shown that the main cause was the improper stowage of containers stacked above a 30-foot container that was only designed to take the maximum permissible stack weight of 150 tons, whereas the stacked weight of the seven containers above the collapsed container was 225 tons. Another factor that may contribute to this incident is believed to be a major problem in the container trading.²⁰⁵ When planning the weight distribution, dangerous cargo segregation and stability factors, they were being prepared by the charterer having full reliance on the computer system; but they did not have access to the vessel's Cargo Security Manual (CSM).²⁰⁶ When containers are stowed on deck, they must be stowed in accordance with the

²⁰⁴ See Chuah, J. *Container stowage - a matter of cooperation or liability* STL (2008) 01 June

²⁰⁵ There have been several accidents involving the collapse of stacks of containers, e.g. *P&O Nedlloyd Genoa* (2006)

²⁰⁶ The manual, prepared by the shipbuilder for vessels of the same class as *Annabella*, provided details of the container securing arrangements and devices on the vessel as well as general information on safety-related aspects of container stowage. Information relating to specific lashing requirements for containers in the various stowage bays of the vessel was shown on plans annexed to the manual. It is part of the proper loading and stowage to have this manual (CSM) cross-referenced with the charterer's stowage plan. On this topic see Draeger, J. and Zhu, B. *Complete boxship charterparty solution?* Lloyd's List (28 Dec. 2005)

stack and tier weight limits set out in the Cargo Securing Manual.²⁰⁷ Therefore, stowage of containers must be in accordance with the approved CSM and is part of the carrier obligation to exercise due diligence. Notwithstanding, such exercise nowadays can only be taken via the new communication technology,²⁰⁸ where ships' staff are able to gain access to the plan prior to the vessel's arrival at her destination in order to identify the problem, i.e. verify the permissibility of the stacking weight and amend the stowage plan avoiding the vessel being unseaworthy in terms of not following the Safety Management System of the vessel which provides detailed instructions and guidance on how the vessel was to be operated and aspects of container stowage. Such operations are not time-consuming if it is carried out by feeding the received information into the on-board loading system. This is important especially for the feeder vessel that had no time for the master to satisfy himself of the safety of the planned cargo disposition when the vessel was in port. The report of MAIB stated:²⁰⁹

"In this environment, where speed of operations is the imperative, the chief officer is unlikely to have the necessary influence to be able to stop or slow the operation while he makes a detailed check of all aspects of the stowage plan or of individual containers. Without such a check, it is inevitable that errors made during the planning/loading process will be undetected."

Finally, even if stowage and securing is the responsibility of the charterer under the charterparty, the master and officers of the vessel have an obligation to exercise due diligence to make the vessel seaworthy, which includes ensuring that containers are stowed and secured so as to prevent damage to the vessel or to other containers. Thereby, this may justify the necessity of the extension of obligation as it is the only way to ensure seaworthiness in terms of container stowage plans by using the technology of communication while the vessel is in transit to her destination as there are practical difficulties in examining the stowage plan at the port of loading.²¹⁰

²⁰⁷ For more information, see Loss Prevention Briefing for North of England Members *Stowage and Securing of Containers* (2008), p.3. Accessed at www.nepia.com

²⁰⁸ Once the cargo plan had been prepared, it will be sent to as a bay plan/stowage plan on an electronic data file to the vessel as an attachment to the vessel's e-mail. In this case, the vessel's loading computer was wrongly set. Therefore, it did not give alarm when the stack weight was exceeded.

²⁰⁹ Under Section 2.9 of the MAIB report on the investigation of the collapse of cargo containers on the *Annabella* case. Report No 21/2007. http://www.maib.gov.uk/cms_resources/Annabella_Report.pdf

²¹⁰ Schilling *The effect on International Trade of the Implementation of the Hamburg Rules from the Point of view of a Shipowner* CMI Colloquium on the Hamburg Rules (Vienna 1979) p.19

The availability of the new technology of communications has justified the importance of the extension of seaworthiness throughout the voyage in regards of container stowage.

The Rotterdam Rules have received points of criticism²¹¹ relating to the extension of seaworthiness obligation to the entire sea voyage; the Rules impose greater responsibility on the carrier as compared with the current law of Hague/Hague-Visby regime.²¹²

The question is: "Is it reasonable to extend the obligation of seaworthiness?"

The carrier's obligation to exercise due diligence in providing a seaworthy vessel for the entire sea voyage should not be understood to impose a heavier and unreasonable burden on the carrier, his duty is an obligation merely to act reasonably using the skill and the care of an prudent carrier to keep his vessel in a seaworthy situation at all times during the sea voyage. This is believed to be reasonable. First, similar to the current system, the carrier is still obliged to exercise due diligence before and at the beginning of the voyage. By doing so, he is discharging most of the burden of seaworthiness prior to sailing, such as the preparation to sail which consists of thorough maintenance and repairs to the vessel's hull, holds and engines. The rest of the obligation of seaworthiness consisting of maintaining the vessel's equipment and properly carrying some particular spares for repairs to keep the vessel in a seaworthy condition is completed between her leaving the port of loading until her arrival at the port of discharge. In transit, the maintenance required must comply with international standards, i.e. ISM which regulates the responsibility of the masters,²¹³ and the maintenance procedures²¹⁴ under the vessel's Safety Management System.²¹⁵ Therefore, the carrier from the time the vessel sails to her arrival will be required to

²¹¹ The point was made by the Executive Vice-President of AP Moller-Mearsk AS. Knud Potoppidan when he discussed the final text of the Rotterdam Rules at the CMI's conference in October 2008. A synopsis of comments of national associations on the 31 May 2001 edition of the Draft Outline Instrument is published in CMI Yearbook 2001-Singapore II, 383 and, as respects the comments on Article 5, at 433

²¹² The current law, under the Hague/Hague-Visby Rules and common law, the obligation to provide seaworthy vessel should be exercised before and at the commencement of the voyage. See *McFadden v Blue Star Line* [1905] 1 KB 697 at p.704. *Maxine Footwear Co. Ltd. and Another (Appellants) v Canadian Government Merchant Marine Ltd* (Respondents) [1959] AC 589. *Tattersall v The National Steamship Company, Ltd*, (1883-84) LR 12 QBD, 297. *Compania de Naviera Nedelka S.A. v Tradax International S.A.*, (*The Tres Flores*), [1973] 2 Lloyd's Rep. 247

²¹³ ISM Code Article 5

²¹⁴ ISM Code Article 10

²¹⁵ ISM Code Article 1.4

exercise only due diligence to make the vessel seaworthy. Of course, the obligation in exercising due diligence during the sea voyage would not impose an absolute duty, as under the common law. The required standard is to be measured by applying the objective test of a prudent owner²¹⁶ who takes into consideration the particular circumstances of each case, such as the ability of the carrier to repair his vessel while sailing without causing a considerable or unreasonable delay to the vessel, or the type of vessel, i.e. coastal or deep sea vessel because the obligation cannot be carried out in the same manner as when the vessel is in port,²¹⁷ so that the compliance thus should be assessed with regards to the circumstances occurring at the material time. The question would be: “How seaworthiness can be maintained on a continuous basis through out the voyage?”

Fulfilment of extended seaworthiness according to the categories of maintenance/repairs

While the vessel is en route to her destination, it is possible, even if the due diligence was exercised before or at the commencement of her voyage, her machineries and equipment are subject to failure and breakdown. The sea crew and officers on behalf of the carrier might be able to repair the vessel if the spare parts,²¹⁸ according to the vessel's class, are available on board.²¹⁹ There is a possibility that it might not be possible for the vessel to be made seaworthy until it reaches a port of call. The response to that is in the twelfth UNCITRAL session stating that the obligation of seaworthiness is not strict and it is only to exercise due diligence in providing a seaworthy vessel.²²⁰ It should be borne in mind that the obligation is not exclusive to have a vessel fitted with sound working machineries that never break. But it is

²¹⁶ *F. C. Bradley & Sons Ltd v Federal Steam Navigation Company Ltd* (1926) 24 LILR 446, 454. The test is: the vessel “must have that degree of fitness which an ordinary careful owner would require his vessel to have...having regard to all the probable circumstances of it.” (Sumner LJ)

²¹⁷ See the same concerns were expressed in Berlingieri, F. *Basis of liability and Exclusion of Liability* [2002] LMCLQ 336 at p.338. Also, see commentary to Draft Instrument, under Article. 5.5, CMI Yearbook 2001 - Singapore II, at p.551

²¹⁸ Spares and repair equipment must be provided for life-saving appliances, for their components and for other equipment and machineries which are subject to excessive wear or consumption and which need to be replaced regularly (Regulation 84(4) OSR; no equivalent provision in SPSR)

²¹⁹ The vessel is properly equipped and supplied for the expected duration of the voyage in terms of a sufficient and competent crew, navigational equipment and supplies, stores, provisions and spares, bunker fuel, fresh water etc. *Project Asia Line Inc v Shone (The Pride of Donegal)* [2002] EWHC 24 [2002] 1 Lloyd's Rep. 659 at p.674. (Andrew Smith J)

²²⁰ Report of the twelfth session of the UNCITRAL. Para. 149

important to have an adequate number of spares that support everyday operation, for without them the vessel will not be seaworthy.

a) Repairs by vessel's crew: available spare parts

It should be remembered that a vessel at sea has limited manning levels, and although they may be competent, they may possess only a limited ability to carry out certain types of repairs and/or maintenance. A vessel, therefore, is not likely to be classed as unseaworthy if a breakdown is found and that the problem cannot be repaired on board because either the required spare parts are not available²²¹ or the fault requires the attention of an expert. Nevertheless, if a problem has developed during a voyage which may render the vessel to be unseaworthy, the vessel's crew would attempt to repair the problem within a reasonable time and taking reasonable steps. By so doing, the carrier has presumed to discharge the burden of due diligence in order to provide a seaworthy vessel. Even if her crew have not succeeded in restoring her back to her seaworthy status, they have satisfied their obligation.²²² This is indeed true as seaworthiness, according to Cresswell J, is to be judged "by the standards and practices of the industry at the relevant time, at least so long as those standards and practices are reasonable."²²³ Furthermore, the Working Group III²²⁴ stated: "However, it was suggested that the degree of diligence would or should depend on the context, to the effect that, for example, the duty of the carrier would be different depending on whether the vessel was at sea or in port." Furthermore, it would not be fair to render the carrier taking reasonable care in cargo protection liable. Otherwise, he would be compelled to exercise extreme and unreasonable diligence

On the other hand, if a vessel has begun her voyage and some loss or damage has resulted from a problem that was discovered prior to the vessel commencing her voyage, e.g. in port, and if the vessel's staff have attempted to carry out the repair but failed, then the carrier would still be liable for the damage that was caused by its unseaworthiness.²²⁵ In other words, there will be a breach of seaworthiness obligation

²²¹ Repair works and maintenance that required specialised personnel to carry it out

²²² Without breaching of the rules set out in the ISM Code or other international regulation

²²³ *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002] EWHC 118 at p.127 [2002] 1 Lloyd's Rep. 719 cited in Dockray, M. *Cases & Materials on the Carriage of Goods by Sea*, (3rd edn.), Routledge Cavendish

²²⁴ A/CN.9/510 - Report of the Working Group on Transport Law on the work of its ninth session April 2002, p.15 taken from <http://daccessdds.un.org/doc/UNDOC/LTD/V02/541/91/PDF/V0254191.pdf?OpenElement>, on 17th July 2006

²²⁵ *Guinomar of Conakry and Another v Samsung Fire & Marine Insurance Co (The Kamsar Voyager)* [2002] 2 Lloyd's Rep. 57

if they prove inadequate²²⁶ or if, during the voyage, they break down or fail to act owing to some initial defect.²²⁷ The law can not protect the carrier who did not exercise necessary steps to prevent loss or damage although he would be able to avoid it. In that case, since the carrier is liable, he would definitely spend less on the protection of goods than is required, preferring instead to insure his liability. As he is liable to his underwriter and only when he deliberately causes loss or damage attributed from unseaworthiness, he might become careless in precluding loss or damage for which the insurer cannot claim any reimbursement from him. Furthermore, the shipper would most likely avoid exercising due diligence in packing, marking or refurbishing containers to avert loss or damage, which the carrier is liable for, in order to relieve himself of costs. Liability of this nature thus encourages the carrier to set and maintain a reasonably acceptable standard of care.

Professor Berlingieri commenting on Article 14²²⁸ said:

“[T]he degree of diligence that is ‘due’ must be determined on the basis of the circumstances. During the voyage, only the master and the crew are available to correct any unseaworthiness that arises during the voyage but does the development of communication made it possible to arrange for an expert?”

b) Repairs by experts: unavailable spare parts

The extension of exercising due diligence to provide a seaworthy vessel is justified (Article 14) by the developments in the safe shipping requirements.²²⁹ The age of information technology and access to information by recent communication methods has assisted in this according to the development of maritime conventions, i.e. SOLAS. Shipowners are obliged to use advanced communication systems which will allow the vessel to be in contact with the shore throughout the voyage including in the deep sea should the vessel require maintenance that cannot be made without the spare parts and/or an expert. New technology of communication²³⁰ has made it so easy to the

²²⁶ *Stanton v Richardson* (1875) 3 Asp MLC 23, HL

²²⁷ *Maori King (Cargo Owners) v Hughes* [1895] 2 QB 550, 8 Asp MLC 65, CA

²²⁸ Article 16(1) UNCITRAL Working Group III 16th session, Vienna 28 Nov - 9 Dec. Document in the draft instrument, A/CN.9/WG.III/WP.56, p.19. <http://daccessdds.un.org/doc/UNDOC/LTD/V05/870/82/PDF/V0587082.pdf?OpenElement>. Accessed on 9th May 2006

²²⁹ UNCITRAL Preliminary draft instrument on the carriage of goods by sea of 8 January 2002, Article 5 para 61

²³⁰ See Boisson, P. *Safety at Sea: Policies, Regulations & International Law* (Bureau Veritas) at p.518; Zilkiewski, J. and Morazzani, C. “Relationships, Information Technology and the Shipping Industry - An Exploratory Investigation UMIST, cited in www.impgroup.org/uploads/papers/4613.pdf

extent that the vessel's staff are able to send/receive information (electronic picture and data information) regarding the status of the vessel and the type of repairs or spares needed to be delivered to the vessel when arriving at the first port of call. Alternatively, an arrangement of a smaller delivery boat could be prepared by an agent through the carrier or by a designated person²³¹ to meet the vessel in transit near to a sea service zone whilst en route to her destination for the delivery of needed spare parts and/or experts to carry out the work. So, as long as the carrier and his servants try their best to bring the vessel to her seaworthiness status again, then his obligation to maintain the vessel under Article 14 is absolved and would not be liable for any consequences.²³²

How due diligence should be exercised on containers?

It has been demonstrated above (see due diligence chapter) that the carrier, pursuant to Article 14, is bound to exercised due diligence 'before, at the beginning of and during the voyage by sea.

Whether, the carrier, if he is the supplier of the container, or a party acting on his behalf in carrying out the duty of checking the condition, fitness, maintain and concealing of containers must, appropriately, be done prior the consolidate of goods into the containers, not when loading the container on to a road vehicle or a vessel. however, raises questions; is this incorporated provision, that the parties have added to the contract of carriage an extra or independent agreement?

The legal aspect of supply of container in bills of lading

Even if one jurisdiction regards the obligation to provide a cargoworthy container as part of the obligation of seaworthiness, i.e. as the same as that of providing a seaworthy vessel, the prevalence use of the container means that bills of lading, especially in liner trade, will commonly contain provisions relating to them that manage the rights and obligations of parties.²³³ In which case, the carrier may not be subject of

²³¹ The role of the designated person, mentioned in the ISM Code, would be of great importance, as he would be leasing between the ship and the management of the shipping company.

²³² A/CN.9/510 - Report of the Working Group on Transport Law on the work of its ninth session April 2002, p.15 taken from <http://daccessdds.un.org/doc/UNDOC/LTD/V02/541/91/PDF/V0254191.pdf?OpenElement>, on 17th July 2006

²³³ It is however often to find that in the short-sea shipments provision or away bill, or other non-negotiable documents mean that the Hague/Hague-Visby Rules as scheduled to the COGSA Act 1971 are not compulsorily applicable to shipments from UK unless incorporated by means of a paramount clause within the terms of section 1(6)(b) of the 1971 Act. see for example *The European Enterprise* [1989] 2 Lloyd's Rep. 185, esp. pp. 188 and 191, cf. *The*

binding duties and obligations as the carrier can contract out of possible liability for the supply of defective containers; it is common to see in liner bills of lading a clause, for specialised transport such as use of a refrigerated container, exclude liability in respect of the care of the refrigeration unit when the container is not in the actual possession of the carrier. It is not uncommon to find, in the short-sea ferry services, a clause which states that the carrier will use its best endeavours to connect any vehicle, trailer or container to the vessel supply of steam or electricity and to maintain the supply, but will not be liable for the breakdown even if due to negligence.²³⁴ For example, the bill of lading may provide that “(1) The Carrier shall not be liable for loss of or damage to the goods caused...the unsuitability or defective condition of the container, provided that, if the Container has been supplied by or on behalf of the carrier, this unsuitability or defective condition could have been apparent upon inspection by the merchant at or prior to the time when the container was packed.”²³⁵ This clause does not place any liability on the part of the carrier despite that it did not shift the performance onto the part of the shipper, where if it did, responsibility and liability will be on the shipper.

On the other hand, it is more common to find, where bill of lading issued, a clause which incorporates the Hague/Hague-Visby Rules which should be applied.²³⁶ In respect of the container, the responsibility surrounding its supply may well be viewed as part of the complex of duties imposed in respect of the seaworthiness of the vessel.²³⁷ However, any clause such as the above²³⁸ may be nullified by Article 3, r. 8 of the Hague/Hague-Visby Rules. The supply of fit container would be a statutory obligation which cannot be relieved or lessened by contractual terms.²³⁹ However, this is not always the case, in a French case,²⁴⁰ it was held that exclusion of liability for supply of

Vechscroon [1982] 1 Lloyd's Rep. 301. On this, it was said that it has not been unknown for all liability to be completely excluded, including an express exclusion of liability for unseaworthiness. See David Glass, *Freight Forwarding and Multimodal Transport Contracts*, (2004, Informa), at para. 4.88.

²³⁴ See, further, J. Wong, “Container Transportation and Anomalies in the Law” (1995) 23 *Aus.Bus.Law.Rev.* 340.

²³⁵ Clause 8(1)(c) of P & O Containers Bill. For a similar clause see Clause of Sea-land Service Bill.

²³⁶ Compare David Glass, *Freight Forwarding and Multimodal Transport Contracts*, (2004, Informa), at para. 4.88 with Frank Stevens, “Liability for defective containers: charting a course between seaworthiness, care for the cargo and shipper liabilities”, at p. 2, presented at Eighth Annual International Colloquium on Carriage of Goods- Sea Transport and Beyond, 6-7, Sept. 2012, Swansea University.

²³⁷ See, e.g. *Zim Israel Navigation Ltd v The Israel Phoenix Assurance Company Ltd* (1999) 34 E.T.L. 535, Sup. Ct. of Israel, 1.9.98.

²³⁸ Clause 8(1)(c) of P & O Containers Bill. For a similar clause see Clause of Sea-land Service Bill.

²³⁹ *The Red Jacket* [1978] 1 Lloyd's Rep. 300. (US Southern Dist. Ct. NY).

²⁴⁰ *Cour d'Appel de Rouen*, 7.2. 1985, [1987] DMF 510. Cf. *Federated Department Stores v Brinke*, 450 F. 2d 1223 (5th Cir. 1971)

unfit container was not null pursuant to Article III, r. 8., where damage did not occur during the sea carriage. In the US, the court find another way to exclude the liability of the container by treating the container that provided by the carrier as a packing. This is demonstrated in *Cigna Insurance Company of Puerto Rico v The M/V Skanderborg*,²⁴¹ where the unfitness of the container supplied by the carrier was treated as a defective packing rather than a defective container. The problem of non-liability derived from the fact that the container is treated as a package. Even if there could be liability for some common law negligence, COGSA imposes no duty on the part of the carrier in regard with their packing arrangements with shippers so that liability for it can be excluded.²⁴²

Conclusion

By way of a postscript, it might be desirable to deem that all containers be hypothesised legally as a part of the equipment or structure within the vessel's hull. On that basis, there would be no longer any question regarding the application of the common regime which in turn would give an advantage of giving an apparent legal solution on issues such as exercising due diligence to supply a seaworthy/cargoworthy container by the carrier rather than the shipper or consignor.²⁴³ Otherwise, there is a need for a new regime to solve all the problems.

The extension of the carrier's obligation for the entire sea voyage should not be considered a problem as the shipping industry had already adopted such an approach which can be seen in some recent charterparties. In fact, the continuous obligation is in line with the present and future practice of shipping industries which has had the impact of the burgeoning advanced communications and navigation. Common sense says that the development of new regulations and conventions, concurrent with the needs of the Rotterdam Rules, will promote a tool that is fit for a new era of shipping.

²⁴¹ *Cigna Insurance Company of Puerto Rico v The M/V Skanderborg* [1996] A.M.C. 600 (U.S.D.C Puerto Rico 1995)

²⁴² It must be said that if the provision of container covers the inland carriage, it is the COGSA and not state law which governs the liability especially when COGSA is extended by the bill of lading to cover the pre and post sea carriage. See *Junior Gallery Ltd v NOL Ltd* [1999] A.M.C. 565 (S.D.N.Y. 1998).

²⁴³ Or other limitation problems

Effect of Shipping Standards on Seaworthiness

1. Introduction

Laws relating to the Carriage of Goods by Sea have been in existence since ancient times; they have emerged from policies of customs of practice, precedents and ships' operators. For example, the Hague/Hague-Visby Rules¹ were contrived from the common law to properly regulate the commercial interests of a contract at the relevant time. Law is dynamic, which means that it can be reshaped according to the development of the shipping industry. This development results from the practice of good seamanship, quality customs, scientific researches, and so on,² which make a major contribution to the process of setting the shipping sector that is codified in regulations, codes, conventions, and so on, to constitute the standards of the shipping industry. This is the standard that courts take into consideration in deciding their cases³ and the benchmark for measuring and distinguishing prudent and diligent shipowners from negligent ones who do not perform their obligations prudently and diligently when they exercise their obligations, i.e. in providing a seaworthy vessel.

The need to adopt new standards to cope with the thrust of new technologies and developments applying to vessels and their equipment has caused the shipping industry to experience numerous developments, starting with the Safety of Life at Sea (SOLAS) Convention and the Convention on Standard of Training, Certification and Watchkeeping for Seafarers (STCW Convention).

As these conventions affect a major part of the shipping industry, they therefore could directly or indirectly affect the carrier's obligation to provide a seaworthy vessel. This article sheds light, in general, on these conventions as well as their problems which affect the obligation of seaworthiness. It is therefore essential to deal with the current Carriage of Goods by Sea law (under common and Hague/Hague-Visby Rules) which is of crucial importance to the industry's standards, and that may influence a carrier in complying with the obligation of seaworthiness.

2. Relevance and Importance of the Standards of Industry

Shipowners⁴ have to comply with a number of requirements of the cargo-owner. These obligations, ordinarily, are set out in the contract of carriage or are part of various statutory regulations. The application of the Hague/Hague-Visby Rules obliges the shipowner

to adhere to certain sets of requirements in order to provide a seaworthy vessel.⁵

The above obligation reflects the common law test of seaworthiness cited in *McFadden v. Blue Star Line*,⁶ which stated that for a vessel to be seaworthy, she 'must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it'.⁷ In

* Plymouth University, Law School. The author wishes to thank Professor Paul Todd and Kathleen Goddard for their invaluable comments.

1. Before that there was the Harter Act.
2. Numerous groups and associations (of non-governmental origination) have contributed to the process of developing safety regulations, such as; shipbuilders and equipment manufacturers; shipping companies including shipowners, charterers, fleet operators and managers; seafarers; shippers and cargo owners; insurers; classification societies and standard-setting bodies; port authorities; and navigational aid services. The rise in marine incidents led to extensive research funded by governments: The UK Department of Transport, in 1988, funded research carried out by the Tavistock Institution. This research resulted in the report 'The Human Element in Shipping Casualties' 2 (HMSO, London, 1988) ISBN 0 11 551004 4. This report was then taken to the IMO. In 1992, the House of Lords Select Committee on Science and Technology, chaired by Lord Carver, issued a report on the 'Safety Aspects of Ship Design and Technology' House of Lords Session 1991-92, HL Paper 30-II and HL Paper 75.
3. The shipping industry's conventions, codes, regulations, and so on are the standards which create the force behind nearly all the technical standards and legal rules for safety at sea and prevention of accidents, pollution, loss of life and cargo at sea. See P. Boisson, *Safety At Sea* (1999, Bureau Veritas), 137.
4. The term shipowner is used throughout this paper in its widest meaning, this includes the bareboat charter and shipmanager, in other words is the sea carrier excluding the time or voyage charterer.
5. Article III, r.1: 'The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to: (a) make the ship seaworthy; (b) properly man, equip and supply the ship; (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.'
6. *McFadden v. Blue Star Line* [1905] 1 K.B. 697, at 706. Channel J.
7. Also Field J in *Kopitoff v. Wilson*, stated that the shipowner should provide a vessel 'fit to meet and undergo the perils of the sea and other incidental risks which of necessity she must be exposed in the course of the voyage'. *Kopitoff v. Wilson* (1876) 1 QBD 377 at p. 380.

other words, under the Hague/Hague-Visby Rules, the shipowner must exercise due diligence⁸ by carrying out all reasonable measures, according to the industry's standards at the material time of the omission, to man,⁹ equip,¹⁰ supply¹¹ and make the vessel¹² in all aspects fit to encounter the perils of the sea.

3. The Potential Legal Implications of the Industry Standards on Seaworthiness

The law relating to the carriage of goods by sea is an old law, initiated by customised conditions and precedents in common law and then developed into rules, such as the Hague/Hague-Visby Rules¹³ to meet the standards of the industry. This illustrates that the law is dynamic with reasonable flexibility to develop and meet the constant changes of the industry. The legal question of what constitutes the necessary level of due diligence has probably changed over time and will continue to change with the trends of the shipping industry.¹⁴

Therefore, the rules in general, and seaworthiness in particular, must be judged by the standards and practices of the industry.¹⁵ In deciding maritime cases, whether under the common law or the Hague/Hague-Visby Rules, courts take into consideration the industry standards, which might be in the form of the requirements of international conventions, rules, regulations, codes and practices, and so on. However, these same international requirements include the origin of the industry itself. Cresswell J in *The Eurasian Dream* affirmed the words of Lord Sumner that '[s]eaworthiness must be judged by the standards and practices of the industry at the relevant time, at least so long as those standards and practices are reasonable'.¹⁶

These aspects of the industry's standards are a yardstick for measuring and distinguishing good shipowners from those who do not comply with these standards, breaches of which might cause the unseaworthiness of their vessels.¹⁷

It was mentioned above that there are vast numbers of regulations governing the industry's standards and it would be impossible to cover every one of them in this study.¹⁸ This paper will cover the international public standards of the industry which have a direct impact on vessels' operational standards that are required under the obligation of exercising due diligence to provide a seaworthy vessel. These particular standards of the industry, which govern the seaworthiness of vessels, are regulated primarily by IMO conventions, namely:¹⁹

- International Convention on Safety of Life at Sea (SOLAS), 1974;²⁰ and
- International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978.

These rules and regulations are principally concerned with the strength of the vessel and the reliability of its

8. Tetley defined due diligence as a 'genuine, competent and reasonable effort of the carrier to fulfil the obligations set out in subparagraph (a), (b) and (c) of Art III (1) of the Hague or Hague-Visby Rules'. See Tetley, W. *Marine Cargo Claims* (4th edn, Éditions Yvon Blais 2008), at p. 876.
9. *The Roberta* (1938) 60 Ll Rep 84: the court held the ship to be unseaworthy because the shipowners employed an engineer who proved to be incompetent. *The Eurasian Dream* [2002] 1 Lloyd's Rep 719: the master's ignorance of fire hazard, supervise stevedores and particular characteristics of the fire fighting on the ship constitute incompetence consequently rendered the vessel unseaworthy due to improper manning.
10. *Project Asia Line Inc v. Shone (The Pride of Donegal)* [2002] 1 Lloyd's Rep 659: defects in the generators, which amounted to a real risk that the ship might have been left without power during the course of voyage, rendered the vessel unseaworthy; *Haracopos v. Mountain* (1934) 49 Ll Rep 267: a defect in the steering gear rendered the vessel unseaworthy.
11. *A Turtle Offshore SA v. Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep 177: there was a breach of the exercise of due diligence in providing inadequate bunker at the commencement of the voyage, which rendered the tug unseaworthy, however the defendants were protected from liability by an exemption clause; *Owners of Cargo Lately Laden on Board the Makedonia v. Owners of the Makedonia (The Makedonia)* [1962] 1 Lloyd's Rep. 316: contaminated bunker fuel rendered the vessel unseaworthy.
12. *The Toledo* [1995] 1 Lloyd's Rep 40: damaged plating and deformation of the bracket rendered the vessel unseaworthy; *Southern Sugar & Molasses Co Insurance v. Artemis Maritime Co Insurance* [1950] AMC 2054: loose rivets rendered the vessel unseaworthy; *Huilever SA v. The Otho* [1943] AMC 210: a crack in one of the ship's hull plates rendered the vessel unseaworthy.
13. Followed by the emergence of the Hamburg Rules
14. Lord Sumner – *Bradley & Sons Ltd v. Federal Steam Navigation Co* (1926) 24 Ll.L. Rep. 446 (1927) 27 Ll.L. Rep. 395 as per Lord Sumner. Lord Sumner in a case prior to the emergence of the Hague-Visby Rules describes the situation: 'In the law of Carriage of Goods by Sea, neither seaworthiness nor due diligence is absolute, both are relative among other things to the state of knowledge and the standards of [industry] prevailing at the time.'
15. Cooke, J., Young, T., Kimball, J., Lambert, L. & Martowski, D. *Voyage Charter* (3rd edn, 2007), Chapter 11, para. 11.19.
16. *Papera Trades Co Ltd and Others v. Hyundai Merchant Co Ltd and Another (The Eurasian Dream)* [2002] 1 Lloyd's Rep 719 at para. 127.
17. Bachxevanis, K. "Crew negligence" and "crew incompetence": their distinction and its consequence', *JIML* 16 (2010), 125.
18. Although other regulations contribute to the industry's standards, such as the Classification Society, they generally exclude the ship's operational standards (i.e. manning, crew qualification, equipment management and lifesaving appliances such as lifeboats, life rafts and lifejackets), navigational aids (on-board equipment and navigational equipment such as radar, electronic charts and Gyro).
19. Susan Hodges has affirmed that safety of ships relates to seaworthiness, although it has a specific and precise meaning under the maritime law. Still, this particular aspect of safety is regulated primarily by IMO conventions, namely: SOLAS 1974, Load Lines Conventions 1966 and STCW 1978.
20. For example, certificates required by SOLAS to be issued by the flag administrations include international tonnage certificate, passenger ship safety certificate, cargo ship safety certificate and load line certificates.

machinery and equipment, and the competence of the crew, which directly and indirectly relate to the obligations under the Hague/Hague-Visby Rules to provide a seaworthy vessel. Thereby, the above regulations have a dual purpose: to promote a culture of safety at sea as well as to have consequences on standards of seaworthiness. This means that the required standard of care or due diligence set by the law might be assessed by reference to the standards of the industry that reasonable prudent shipowners would require to be set for their vessels.²¹ If a new means of improving safety at sea is produced, the industry's standard is correspondingly developed.²² For example, if a vessel's construction does not comply with industry standards, such as SOLAS, or even if heavy corrosion has resulted in the ingress of water damaging the cargo, then the vessel is rendered unseaworthy.²³

4. SOLAS²⁴

SOLAS lays down a comprehensive scope for the minimum standards for safe construction of vessels and the basic safety equipment to be fitted on board. The essential aim of SOLAS is to provide safe vessels that can navigate the seas without endangering life, the environment or cargo.

However, it should be noted that since the SOLAS Convention sets out a requirement in connection with the safe operation of vessels, it is analogous to the safety aspect that might be achievable under the obligation of seaworthiness, because the general definition of seaworthiness requires the vessel to be safe in order to be able to carry its cargo safely. This requires a standard of safety, which can be achieved if the shipowner adheres to the scope of SOLAS as it is embraced within its provisions. This enhances the safety of vessels at sea and minimises the loss of life and reduces the damage to cargo and property. SOLAS also indirectly contributes to preventing pollution of the environment. If its provisions are not properly observed, this might equally constitute a lack of due diligence.²⁵

This again makes no difference when comparing SOLAS with the duty to exercise due diligence, which is the effort of a competent and reasonable carrier or any person working for him to provide a safe and seaworthy vessel to fulfil the requirements set out in Article III, Rule 1.²⁶

Due diligence obliges the shipowner to carry out all reasonable measures in the light of the standards of the industry for the purpose of providing a seaworthy vessel and to ensure the safe state of the vessel.²⁷ In this manner, the safety of shipping is, at present, governed principally by the international industry standards, i.e. conventions and regulations. SOLAS is therefore one of those standards.²⁸

EWHC 118, at p. 127, Cresswell judge stated: 'seaworthiness must be judged by the standards and practice of the industry at the relevant time, at least so long as those standards are practical and reasonable'; see *The Subro Valour* [1995] 1 Lloyd's Rep. 509 at p. 516; and the same point in *The Kapitan Sakhrav* [2000] C.L.C. 933, Auld L.J. stated: 'the test to be objective, namely to be measured by the standards of a reasonable shipowner, taking into account international standards and the particular circumstances of the problem in hand', at p. 947.

22. The undertaking implied by common law requires that the vessel be seaworthy. There is no implied undertaking that the vessel be a 'safe ship' in UK law, though this is probably the case in the US. For American cases, see *Hutton v. Royal Exchange Assurance* [1971] N.Z.L.R. 1045 Sc.; *The Fiona* [1994] 2 Lloyd's Rep 506.; *Woolf v. Clagget* [1800] 170 E.R. 607. However, these rules were adopted into English law by the Merchant Shipping (Safety of Navigation) Regulations 2002 SI 2002/1473, as amended by SI 2004/2110.
23. See *The Miss Jay Jay* [1987] 1 Lloyd's Rep 32 (CA): a design error, namely using materials in the design that were unsuitable for the purpose of navigation was held to have rendered the vessel unseaworthy.
24. The generally accepted international regulations, procedures and practices governing ship construction, equipment and seaworthiness which required by Article 94 and other provisions of UNCLOS to observe are basically those contained in SOLAS, Load Lines Convention and MARPOL.
25. Both Safety of Life at Sea and the Loadline Conventions deal with safety and seaworthiness of the vessel; see Carbett H. Spurin, *The Law of International Trade and Carriage*, chapter nine, at p. 33, electronic book cited in The National Academy for Dispute Resolution website: <www.nadr.co.uk/articles/articles.php?category=4>. The same point was raised by Philippe Boisson, *Safety at Sea: Policies, Regulations & International Law* (Bureau Veritas, 1999), 197.
26. W. Tetley, *Marine Cargo Claims* (4th edn, Éditions Yvon Blais, 2008), Chapter 15, p. 876. He defines due diligence as 'genuine, competent and reasonable effort of the carrier to fulfil the obligations set out in subparagraph (a), (b) and (c) of Art III (1) of the Hague or Hague-Visby Rules'. See also, N.J. Margetson, *The System of Liability of Articles III and IV of the Hague (Visby) Rules* (Zutphen: Uitgeverij Paris 2008).
27. Under the revision introduced by the Merchant Shipping Act 1974 there was a change of terminology from an unseaworthy ship as in the old s. 457 M.S.A. 1894 to a 'dangerously unsafe ship' under s. 44 M.S.A. 1988 in respect of a vessel 'unfit to go to sea'. This certainly seems to revert more closely to the concept of seaworthiness than ambiguous term 'unsafe', which fails to specify safety regarding the ability to go to sea and safety for the crew, vessels and cargoes. The most recent section of M.S.A. 1995 has altered all the above section numbers.
28. See *The Princess Victoria* [1953] 2 Lloyd's 619: inadequacy in the stern doors, which were a poor of design. The vessel was not capable of coping with the ordinary perils of the sea and sank in the Irish sea. The Court of Appeal upheld the lower court's decision that the vessel was unseaworthy due to the inadequate construction of the stern doors which made her unable to cope with the perils of the sea, per Lord Macdermott, C.J. See also *The Marine Sulphur Queen* [1973] 1 Lloyd's 88. The court held that the vessel breached building regulations and was therefore unseaworthy. It is important to state that the construction regulations of merchant vessels are extracted from the regulations of SOLAS, Load Lines and classifications society of the vessel; see also *Leonard v. Leland* (1902) 18 T.L.R. 727. During a lifeboat drill a hook fell off and a davit broke. The plaintiff, the lifeboat and the

21. In the due diligence case *Papera Traders Co Ltd v. Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002]

Questions which inevitably arise are: How efficient are these regulations? Does SOLAS, being standards of the industry, govern aspects of seaworthiness?

4.1. *The Impact of the Inefficiency of SOLAS on the Due Diligence to Provide a Seaworthy Vessel – Reducing the Minimum Standard of Industry*

If a shipowner has complied with the requirements of SOLAS and those requirements turn out to be inadequate in providing a safe vessel, they may not prevent a subsequent incident of unseaworthiness. Similarly, if the SOLAS regulations or their implementations prove to be deficient, despite the fact that the shipowner has complied with them, he will as a result still not have exercised due diligence in providing a seaworthy vessel, even though the inadequacy was a result of the deficiency of the regulations and not of the shipowner's action or omission. In order to illustrate this proposition, it is important to refer to case law.

For instance, in *The Eurasian Dream* case, the standard of the industry, particularly the SOLAS Convention, is clearly questioned. In *The Eurasian Dream*, the court criticised the safety standards of the vessel, in particular the inadequacy of her safety equipment. SOLAS had set out the required amount of safety equipment to be placed onboard. A fire broke out causing the vessel and its cargo to be totally lost. The court held that, *inter alia*, the vessel was unseaworthy for not being fitted with the adequate number of walkie-talkies as part of its safety equipment, which would have assisted the crew to communicate with each other in case of an emergency.²⁹ Despite the owner of the *Eurasian Dream* having complied with the standards of SOLAS, providing the exact number of walkie-talkies required, the court nevertheless found that the owner had breached the obligation to exercise due diligence in providing an adequate number of walkie-talkies. The vessel, therefore, was unseaworthy.

Even with the aid of the International Safety Management System (ISM) Code,³⁰ such problems might not have been discovered and would contradict the statement that ISM 'is a system used daily which is actually growing and developing through a process of continual improvement'.³¹

Compliance with the SOLAS Convention does not guarantee the seaworthiness of a vessel in all respects because the compliance with the shipping industry's conventions, such as SOLAS, does not have the same value in international law. For instance, the direct effect of non-compliance with the regulations of the industry may mean the shipowner's vessel will be unable to commence its voyage from the port in question due to lack of clearance certification and documents, or the shipowner would incur a fine or refused entry to the port of destination. The consequences of non-compliance with the regulations is unclear in terms of a breach of seaworthiness. Subsequently, it may affect their legal bearing and the practical effectiveness on

the obligation of due diligence to provide a seaworthy vessel. In other words, the shipowner, on the one hand, will be reluctant to comply with such regulations, if they are not enforced under the flag of the vessel or included in the terms of the particular contract. On the other hand, the judgement by the port state in regard to whether the vessel is unseaworthy/seaworthy, due to non-compliance with SOLAS regulations, will be determined by the port inspector, bearing in mind that SOLAS Convention is not a decisive evidence of seaworthiness. The judgment of such inspector³² will be affected by the way such a flag state implements SOLAS in its law.³³

For example, the English court in *The Eurasian Dream* held that the SOLAS Convention was not a decisive evidence of seaworthiness. When the fire started, the ship was offloading a cargo of cars in Sharjah. The crew were not able to contain the fire and as a result the vessel was abandoned and towed away from her berth. She was eventually lost. The cargo owners claimed for the damage that occurred to their cargo. Their basic argument was that the vessel was unseaworthy and that the carrier had failed to exercise due diligence in providing a seaworthy vessel. The court held that the vessel was unseaworthy, *inter alia*, due to the inadequacy of its safety equipment. The expert witness appointed by the claimants managed to convince the judge that *The Eurasian Dream* needed more walkie-talkies and sets of breathing apparatus despite the fact that *she* had complied with the SOLAS Convention and possessed the required amount of safety equipment i.e. walkie-talkies and fire fighting equipment, at the time of the incident.

hook fell into the water. The jury, by reason of a defective hook and davit of the lifeboat, ruled in favour of the plaintiff. The lifeboats, their hooks and davits are nowadays regulated by SOLAS Regulations 19-20.

29. Another example of SOLAS deficiency, for instant, SOLAS required chart as a replacement of the regular paper chart, the same regulator might not have adequate or clear direction on the use of those new equipment. Eventually it will result to a respond by other regulator to produce guidelines promoting a safe use of such equipment.
30. This is because in *The Eurasian Dream*, although the case was heard prior to the enforcement of ISM, the *Eurasian Dream* itself was prepared to meet the ISM system. There was a Safety Management System available on board at the time of the incident.
31. Philip Anderson, *ISM Code: A Practical Guide to the Legal Insurance Implications* (2nd edn, 2005), chapter one, para, 1.1.
32. This in turn might result in a dispute over the refusal or delay of the vessel caused by the failure of the carrier to exercise due diligence to provide a seaworthy vessel.
33. See Baris Soyer and Richard Williams, 'Potential legal ramifications of the International Ship and Port Facility Security (ISPS) Code on Maritime Law', *LMCQL* (2005), 515 at 525.

4.2. What Can a Shipowner do to Overcome the Inefficiencies of SOLAS?

The judge in the *Eurasian Dream* case alluded to the point that whether the shipowner had exercised the required standard of due diligence to provide a seaworthy vessel and to identify the 'risk' of unseaworthiness to 'establish safeguards' to avoid loss or damage from that unseaworthiness. Mere compliance with the one of the industry's standards, i.e. the SOLAS Convention, is not conclusive as having exercised due diligence by the carrier, nor is it sufficient for the vessel's physical seaworthiness. However, that suggests the following: the carrier needs to determine his vessel's seaworthiness by assessing the standard of the due diligence at all times and not merely rely on meeting the industry regulations or recommendations, such as SOLAS. He should draw on the inherent specialised knowledge that he possesses or ought to possess regarding the fitness of his vessel and by so doing,³⁴ will know the standard of care necessary to fulfil the obligation of due diligence and avoid bringing upon himself a case of unseaworthiness. 'The standard of seaworthiness must rise with improved knowledge of shipbuilding and navigation'³⁵ which is not fully embraced by SOLAS. That is to say, relying exclusively on the regulations of the shipping standards (such as SOLAS) to determine the standard of due diligence is a wrong approach.³⁶ Those regulations, especially technical ones such as involving fire equipment,³⁷ mostly evolve from reactions³⁸ to maritime incidents and are therefore effectively amendments to the regulation. And as a result, in following them, the shipowner will exercise a lower standard of due diligence.

5. STCW Convention

It became clear to the IMO that problems of safety and crew unseaworthiness occur mostly as a result of human factors.³⁹ It is often said that a good crew makes a good ship. Therefore, the IMO/ILO united to produce a guidance document consisting of recommendations on the training and education of seafarers. Most recently, the IMO has established the first convention on standards for seafarers; the International Convention on Standards, Training, Certification and Watch-keeping for Seafarers (STCW).⁴⁰ Nevertheless, there is still the possibility that an officer might be regarded as incompetent due to knowledge or training on specific issues, in spite of holding a valid certificate.⁴¹

A question which inevitably arises in the light of crew seaworthiness is whether these regulations are sufficient to govern the minimum standards of industry in order to reflect the adequate standard of due diligence required by a shipowner in light of the crew competence? Or alternatively, is the STCW sufficient as a minimum industry standard governing the manning aspects of seaworthiness?

34. Knowledge is known exclusively to the carrier/shipowner, such as the stability of the vessel. See *Omega Shipping & Chartering BV v. JSC Arcadia Shipping (The SOCOL 3)* [2010] EWHC 777. The improper stowage of cargo had affected the vessel's overall stability on departure from the last loaded port in Finland. This was an aspect that only the chief officer and master would have known about, not the charterers. The Judge, Mr Justice Hamblen found that there had been a failure on the part of the master and chief officer to supervise the cargo stowage properly with the ship's stability and ultimate seaworthiness in mind. See also Donaghy, T. 'There goes the deck cargo', *Maritime Risk International* (12 Nov. 2010).
35. *Burges v. Wickam* (1863) 3 B. & S. 669, at p. 693, per Blackburn, J.
36. It is important to note that the private sector plays, nowadays, an important role in the enhancement of the safety and seaworthiness of vessels. The International Chamber of Shipping, for example, issues recommendations to reinforce precautionary measures during loading or discharging operations. See 'Long Campaign' Lloyd's List, 7 Sept. 1995; The International Cargo Handling Coordination Association (ICHCA), to ensure proper performance of operations. See 'Pressures grows for action on overloading/discharging practices'. *International Bulk Journal*, Dec. 1994, 99-101; Insurers also have large contributions to enhance the proper practice that failed to reflect due diligence or due care. See for example, 'Figures hide why bulk carrier sinkings are still a problem'. Lloyd's List, 14 Aug. 1992.
37. Horrocks, C. 'Challenges Facing the Shipping Industry in the 21st Century', Sixth Annual Cadwallader Memorial Lecture (15 Sep. 2003) at p. 3.
38. For example, the origin of the ISM Code was as a reaction from representatives of the UK during the 15th session of the IMO in November 1987. They requested that the IMO immediately investigate designs to improve the safety of roll-on/roll-off ferries. The Secretary of the General International Chamber of Shipping said: 'It is often said that advances in the technical regulation of shipping tend to follow a casualty – that the maritime sector responds to, rather than anticipates its problems.' Horrocks, C. 'Challenges Facing the Shipping Industry in the 21st Century', Sixth Annual Cadwallader Memorial Lecture (15 Sep. 2003) at pp. 3-4.
39. 'While statistical analyses suggest that around 80% of all shipping accidents are caused by human error, the underlying truth is that the act or omission of a human being plays some part in virtually every accident, including those where structural or equipment failure may be the immediate cause.' The guidelines on the application of the IMO International Safety Management Code are published by The International Shipping Federation (ISF) and International Chamber of Shipping (ICS), 1994. Philip Anderson, ISM Code at p. 15.
40. The International Convention on Standards, Training, Certification and Watchkeeping for Seafarers (STCW). Basic relevant qualifications and minimum manning requirements will be laid down in the legislation of the flag state and/or possible relevant trade union agreements. These may include the International Labour Organisation (ILO) Convention 147 (Merchant Shipping (Minimum Standards) Convention 1976) and the ISM Code may require flag states to incorporate into their national legislation minimum requirements in respect of criteria such as: safe manning standards, hours of work, seafarer's competency and social security.
41. An example of this is *The Star Sea* [1995] 1 Lloyd's Rep 651.

5.1. *Problems of Manning Seaworthiness Governed by the STCW Convention*

Human beings are an essential factor in a vessel's seaworthiness as most marine accidents are attributable to human factors.⁴² Furthermore, it has also been shown that human unseaworthiness may be raised for different reasons, such as an incompetent crew or inadequate manning numbers.⁴³

Inadequate implementation of STCW – a factor requiring higher due diligence in employing the crew

Despite the guidance given in the STCW Convention, it is regarded as the least acceptable minimum practice of the industry's standards in respect of manning vessels.⁴⁴ Yet, some factors within the Convention prevent the achievement of that minimum standard and diminish it from the standard required of a diligent shipowner, the result possibly being an unseaworthy vessel with incompetent personnel. Therefore, these factors require the shipowner to raise his due diligence standards in order to avoid unseaworthiness.⁴⁵ A factor such as self-evaluation by the flag state in complying with STCW Convention will consequently affect the standard of the crew's competency. For example, the IMO requires countries to provide them with information on how the provisions of the STCW will affect them legally. This includes supervision training, the assessment of all training and the awarding of certificates, which are to be carried out to a certain quality standard.⁴⁶ All the documents provided by the state are subject to assessment. However, the communicated information might not reflect the reality of a lower standard of training or a fault in the certification scheme of the state.⁴⁷ The result could be the supply of an incompetent crew because the convention was not implemented in good faith.

The test as to whether a seafarer has been supplied from a nation with dubious implementation procedures is an objective one. The test is: 'Would a reasonably prudent owner, knowing the relevant facts of the standard of the marine school, have allowed this vessel to put to sea with this seafarer?'⁴⁸

5.2. *The Impact of Risk Assessment on the Manning of the Vessel*

It is an essential part of the exercise of due diligence in providing a seaworthy vessel to have on board a competent⁴⁹ and efficient⁵⁰ crew. The recent revised amendment of ISM Code, Section 1.2.2.2,⁵¹ is intended to develop a new standard of due diligence generally and with respect to manning particularly. This means that a shipowner is now required to carry out risk assessment in order to maximise the effectiveness of the implementation of ISM Code. He should therefore also assess the human element of safety by carrying out a risk assessment. The Code seeks to promote and embed a culture of continuous improvement of manning safety by ensuring that the working conditions do not prevent the crew from working within the set of

rules and regulations that are required to keep the vessel seaworthy throughout the period of the voyage. It is also a means of revealing whether the crew break the general safety rules, and if they do, the situation must be corrected. It is worth mentioning that risk assessment, in addition to the above, will be essential in light of exercising due diligence as it promotes the idea of providing further training, i.e. non-statutory training which some shipowners think expensive and unnecessary. On the contrary, such training is important and the development is essential in improving standards of seaworthiness.

42. *The Human Element in Shipping Casualties*, report commissioned by the Marine Directorate of the Department of Transport. The report is based on research carried out by Tavistock Institute of Human Relations. The report was edited by D.T. Bryant. (HMSO, 1991), 2. The Guidelines on the application of the IMO International Safety Management Code, published by ISC and ISF in 1994, state that 80% of marine accidents are caused by human error but a human act or omission plays a part in any virtually every accident, p. 3.
43. *The Makedonia* [1962] 1 Lloyd's Rep. 316; *Standard Oil v. Clane Line* [1924] A.C. 100. *HongKong Fir Shipping Co. v. Kawasaki Kisen Kaisha* [1962] 2 QB. 26 (CA). For a study on the human aspects of seaworthiness, see *White* [1995] LMCLQ 221.
44. Konstantinos Bachxevanis, "Crew negligence" and "crew incompetence": their distinction and its consequence', *JIML* 16 (2010), 128.
45. The author is of opinion that industry standards would be improved if IMO's mandatory audit scheme were in place. However, the IMO assembly has agreed a programme to make this scheme mandatory, with entry into force of the mandatory audit scheme likely to be in 2015.
46. 'Cooperation make it happen', *Seatrade Review* (March 1997), 65.
47. It is impossible for the IMO to have authority to enforce its regulations. This seems to imply the creation of a team of inspectors and facilities. In practice, this is impossible due to the limited resources of the IMO. Also, it is impossible politically. Most governments would never agree to ships flying their flags to be boarded. Cited in IMO site: <www.imo.org/About/Pages/FAQs.aspx>.
48. *The Hong Kong Fir* [1961] 1 Lloyd's Rep. 159 at p. 168 by Salmon J also *A. P. Stephen v. Scottish Boatowners Mutual Insurance Association (The Talisman)* [1989] 1 Lloyd's Rep. 535 at p. 539. Lord Keith of Kinkell: 'The test is an objective one, directed to ascertaining what an ordinarily competent fishing boat skipper might reasonably be expected to do in the same circumstances'.
49. For example, *The Star Sea* [1995] 1 Lloyd's Rep 651. Tuckey J held that the vessel was unseaworthy, as the master was incompetent.
50. The crew on board a vessel must be adequate in number. Most maritime nations have regulations governing the manning of vessels sailing under their flags. In the UK, according to the Statutory Instrument 1997 No. 1320. The Merchant Shipping Regulations; (safe manning, hours of work and watchkeeping) Regulations 1997.
51. Paragraph 1.2.2.2 of the ISM Code. 'Assess all identified risks to its ships, personnel and environment and establish appropriate safeguards' as amended and entered into force on 1 July 2010, which made risk assessment a mandatory building block of any Safety Management System (SMS).

5.3. *Inadequate Regulations of the STCW Relating to Crew Fatigue (Extreme Tiredness)*

Fatigue⁵² has long been a major factor contributing to human error resulting in accidents.⁵³ It is a biological state to which all individuals are susceptible, regardless of skill, knowledge, competence or training. The type of operations on board vessels demands constant attention and alertness. Fatigue will have a direct impact on the safety of operations. The STCW 1995⁵⁴ amendment attempted to address the problem of crew fatigue by regulating the minimum rest periods for crew. This was introduced so that crew members had adequate hours of rest and were able to operate the vessel safely. In the context of the STCW, every seafarer was allocated a watch or part of a watch. The crew were to receive a minimum of 10 hours rest in every 24-hour period which may be divided into two periods, provided that one part is at least six hours long. Though the STCW 1995 seems to provide effective regulations and guidance, issues such as training drills,⁵⁵ emergencies and economic factors, in addition to consistent reduction of crew size⁵⁶ mean that the STCW regulations can be interpreted flexibly, having a direct effect on the hours of rest, which could result in crew fatigue.⁵⁷ For instance, on short sea voyages, intense workloads are required by the vessel's crew which may be combined with misuse of the exception provision of the convention reading 'emergency, drill or in other overriding operational conditions'.⁵⁸ The hours of rest will inevitably be jeopardised.

This temporary incapacity – fatigue – has been reported to be sufficient to render a seaman incompetent if it exists at the commencement of the voyage.⁵⁹

A crew member may habitually exceed his allotted watch, and, if the vessel requires extra work such as changing cargos to be regularly carried out during the sea passage, extra demand will be placed upon him to operate the vessel accordingly.⁶⁰ Thus, even if a crew member is competent at the beginning of the voyage, he might be incompetent at the beginning of a subsequent voyage if such a crew 'beings working for long hours, losing as little as one or two hours of sleep, they became fatigue and prone to making mistakes'.⁶¹

It is important to understand that, under the current law, the carrier can absolve himself of responsibility simply by arguing that the accident did not occur during the time of obligation, i.e. before and at the beginning of the voyage. As a result, the carrier might be able to avoid crew negligence in matters of navigation and management by virtue of Article IV r.2 (a).

White argues that 'A carrier continue to be responsible for maintaining a competent and efficient crew even after the initial recruitment of them'.⁶² Despite the fact that this statement is intrinsic to the carrier's obligation of seaworthiness, it contravenes the current regime, e.g. Hague/Hague-Visby Rules which oblige the carrier to exercise due diligence only before and at the beginning

of the voyage. So the carrier can still show that he exercised due diligence in that the crew were perfectly competent before and at the beginning of the voyage.

Although there has been no case law on this matter,⁶³ it has been argued that it is possible that a court may find that lack of adequate rest had rendered the vessel unseaworthy because of an incompetent or a temporarily incompetent crew.⁶⁴ This is undoubtedly true if the

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52. It can be defined as a biological state to which all individuals are susceptible regardless of skill, knowledge, training and competence.
 53. Moore W. 'Managing Fatigue', *Human Element Alert Bulletin* 5 (January 2005), 2. Electronic resources cited in: <www.he-alert.org/>. See also Manadaraka, A. *Modern Maritime Law and Risk Management* (1st edn, 2008), para. 3.2.2.
 54. S. A-VIII/1 (Mandatory) and s. B-VIII/1 (guidance) of the STCW Code. The ILO 147 (Merchant Shipping (Minimum Standards) Convention 1976) Convention is also relevant.
 55. The ISPS code requires that vessels must carry out drills and have documented security plans. Such requirements were often perceived as placing additional and unreasonable demands on the crew, as a result, additional burdens on seafarers were found to include: extra paperwork, ISPS drills and longer working hours. It has been reported that 'In the past you could probably just get on with your job but now you have got all this extra paperwork to tell you how to do your job', see Prof. Andy Smith, 'Adequate Crewing and Seafarer's Fatigue: The International Perspective', cited in <www.crew2crew.com/ForumAttachments/'b173972d-6b53-4b50-b7c1->, at p. 12
 56. Crewing levels have changed the last few decades. Thirty years ago many large commercial vessels went to sea with crews of 40 persons. Today much larger vessels often have a crew of half that number and crews of less than 10 are common on smaller ships.
 57. After the incident of *The Antari* when the Chief Officer fell asleep during the navigating watch, the IMO has been criticised in the UK Marine Accident Investigation Branch (MAIB) report for reacting too slowly in addressing the problem of fatigue-related incidents.
 58. See, 'Grounding Leads to IMO Warning', *Maritime Risk Assessment* 14 (April 2009).
 59. See Roger White, 'The human factor in unseaworthiness claims', *LMCLQ* (1995) 221-238, at p. 228.
 60. Lord Justice Aikens, Richard Lord QC, Michael Bools, *Bills of Lading* (LLP, 2006), at para. 10.121. The authors suggest that 'Frequently the consequences of unseaworthiness only become apparent on voyage the courts will have no hesitation, in appropriate circumstances, in inferring unseaworthiness at the beginning of the voyage on the basis of a breakdown or other incident [such as fatigue] occurring subsequently'.
 61. Douglas B. Stevenson, 'Tanker Crew Fatigue: Some New Solutions to an Old Problem', *Journal of Maritime Law and Commerce* 27/3 (July 1996), 453-468, at p. 454.
 62. See Roger White, 'The human factor in unseaworthiness claims', *LMCLQ* (1995) 221-238, at p. 228.
 63. Phil Anderson suggests that 'They are being settled amicably out of court or, occasionally, are reaching a private arbitration hearing.' Anderson, P., 'Fatigue and ISM', *Seaways* (Feb. 2007) [1].
 64. Bachxevanis, K. 'Crew Negligence and Crew Incompetence: their distinction and its consequence', *Journal of International Maritime Law* 16 (2010), 102.

obligation of seaworthiness is extended to cover the entire voyage.⁶⁵

6. What Can be Done to Improve the Current Situation and Reduce Malpractice regarding Shipping Standards?

6.1. *The Maintenance of Due Diligence to Update the Minimum Standard of the Industry*

Since the introduction of the Hague/Hague-Visby Rules, there have been tremendous technological developments with regard to electronic aids and navigation. New methods of performing contracts of carriage have become possible. Thus, 'the standard of due diligence required from the carrier gets higher and higher everyday'.⁶⁶ It is debatable whether due diligence requires the shipowner of an older vessel to upgrade its machinery and equipment in order to satisfy the existing standards of seaworthiness. A shipowner cannot be expected to constantly keep up with all the latest expensive advanced technology. However, the shipowner is to some extent required to furnish his vessel with some recent developments in the industry. The requirement of a 'reasonable shipowner' in preparing or providing a seaworthy vessel is determined objectively to change over time⁶⁷ and with technological developments.⁶⁸ Further, it was argued that the shipowner is obliged to implement such new technology, if it is directly related to the shipping industry as is the case with the International Safety Management System (ISM) Code, which has become mandatory.⁶⁹ Ignorance of the provisions of the International Maritime Organisation – ISM, SOLAS, MARPOL, and so on – may point to the lack of due diligence on the part of the shipowner in connection with safe operation of his vessel which might result in unseaworthiness.⁷⁰ Having said that, there has been judicial reluctance to include the development of machinery and equipment of the industry as part of the shipowner's due diligence in providing a seaworthy vessel,⁷¹ provided that those technological advances are not yet standard for a particular carriage.

Nonetheless, an obligation in the current law on the part of the shipowner to provide a seaworthy vessel accompanied by a clause similar to Clause 52 of the Shelltime charterparty⁷² would put the shipowner at risk of breach of due diligence as it puts a burden on him to exercise all the practicable precautions, i.e. modify or fit new equipment according to the shipping industry, in order to bring it in line with the recently developed standards of the industry. For example, *The Elli and The Frixos*,⁷³ although a recent case concerning MARPOL, illustrates the fact that a shipowner must modernise to meet the latest amendments of the standards of the industry. The owner of two oil tankers, *The Elli* and *The Frixos*, time-chartered the vessels on Shelltime 4 form. The tankers were described as 'double sided'. After approximately 20 months, and before the end of the charter period, new MARPOL Regulations 13F, 13G and 13H came into force which

required all oil tankers to have the relevant documents relating to the physical condition of the vessel in order to carry heavy grade oil cargo. Vessels should be fitted with double bottoms or double sides, extending along the total length of the cargo tanks. The double bottom tanks of *The Elli* and *The Frixos* did not run the entire length of the cargo tanks. Instead, bunker tanks protected the last two tanks (slops tanks) rather than ballast tanks as required by the new MARPOL regulations.

It was held that the warranty in Clause 52 of the charter applied both upon and after delivery of the vessel to the charterer. Furthermore, the same clause explicitly applied to future sailings and expressly referred to the SOLAS and MARPOL Conventions. Thus the vessel was unseaworthy for not complying with the new amendment of MARPOL as required in Clause 52.⁷⁴ It is arguable as to whether the industry standards always meant that the standard of due diligence resulted in a seaworthy vessel.⁷⁵ This statement would be beyond doubt if a clear obligation in the contract of carriage enforced the shipowner to adopt the new regulations. This is commensurate with saying that the obligation is an ongoing one. Because the obligation of obtaining

65. As the case under the Hamburg Rules, Article 5(1) and the Rotterdam Rules, Article 14.

66. Hakan Karan, *The Carrier's Liability Under International Maritime Conventions The Hague, Hague-Visby, and Hamburg Rules* (Edwin Mellen Press, 2005), 282.

67. Sze Ping-fat, *Carrier's Liability under the Hague, Hague-Visby Rules* (Kluwer Law, 2000), 60.

68. See W. E. Astle, *Shipping and the Law* (Fairpla Publication, 1980), 87.

69. W. Tetley, *Admiralty Law*, 84, Sze, *Liability*, 60.

70. Sze Ping-fat, *Carrier's Liability under the Hague, Hague-Visby Rules* (Kluwer Law International, 2000), 60.

71. *President of India v. West Coast Steamship Company (The Portland Trader)* [164] 2 Lloyd's Rep. 443. (United States case); *American Smelting & Refining Co. S. S. 'Irish Spruce' and Irish Shipping Co. Ltd. (The Irish Spruce)* [1976] 1 Lloyd's Rep. 63, at p. 68. (US District Court of New York).

72. Clause 52 of the Shelltime 4: 'Owners warrant that the vessel is in all respects eligible under application (*sic*) conventions, laws and regulations for trading to and from the ports and places specified in Clause 4 of the Charter Party...but not limited to, MARPOL 1973/1978 as amended and SOLAS 1974/1978 as amended and extended.'

73. *Golden Fleece Maritime Inc v. ST Shipping and Transport Inc (The Elli & The Frixos)* [2008] 2 Lloyd's Rep 119; [2009] 1 All ER (Comm) 908.

74. It is difficult to argue that obtaining a document which was not required at the time of delivery can be part of an obligation to 'maintain the vessel in or restore her to' the condition in which she was at delivery.

75. In some countries, they have taken the lead in promoting safety and seaworthy vessels by adopting new navigational and other safety requirements in advance of the international conventions. Ropner, W. G. D. 'Promoting High Standards at Sea – The Shipowners' Contribution', a paper delivered in Fitness at Sea – The International Conference on Seaworthiness (1980) organised by Newcastle University, at p. 44.

a document relating to SOLAS or other certificates of the IMO were not required prior to the commencement of the voyage or at least at the time of delivery, this does not equate to the obligation to 'maintain the vessel in or restore her to' her condition on delivery.

Therefore, the standard of due diligence is not adequate even if ongoing, for the reason that the maintenance of the seaworthiness standard is set at the time before and at the beginning of the voyage, which is not adequate if a new regulation is being enforced after the commencement of the voyage. The standard is, however, said to be raised if a new regulation under the conventions comes into existence requiring the shipowner to carry out further tasks, such as modification to the hull, other than those previously required for maintaining the vessel. This is possible only if there is a clause in the charterparty contract obliging the shipowner to do so. Otherwise, the owner is obliged to carry out such modification before a new contract of carriage is agreed, when the regulation would be part of an initial obligation of due diligence.⁷⁶

The Elli and The Frixos case confirmed that the court will not take into consideration developments in the industry that might take place any time after the vessel commences her voyage during the course of the charter period as part of the due diligence obligation assuming that the obligation is not an ongoing one. Therefore, it was noted that considerations of expediency are already reflected in the charterparty contract and to add a clause to them would indicate an extension of the shipowner's obligation in exercising due diligence to provide a seaworthy vessel from the basic obligation of the Hague/Hague-Visby Rules.

The case further confirms the need for the obligation of seaworthiness to be extended throughout the entire voyage in order to create a fairer charterer/shipowner relationship rather than relying on an initial obligation, such as under the Hague/Hague-Visby rules, if a clause requiring ongoing due diligence of seaworthiness is absent from the charterparty contract. If a contract of carriage is governed by the Hague/Hague-Visby Rules, the shipowner tends to rely mainly on the case law that states: 'It is not the duty of an owner to adopt or use the latest inventions or regulations',⁷⁷ which seems to make the need for new equipment non-essential. In other words, the shipowner would be reluctant to adopt new provisions of SOLAS or any other regulations, for example to fit new equipment when their presence is essential to the vessel's seaworthiness,⁷⁸ such as radar equipment⁷⁹ or a Loran system.⁸⁰

Perhaps, if there is no binding system in the context of the contract of carriage, compliance with new non-enforced regulations will result in shipowners relying on the 'slowness of the traditional procedure for adoption and entry coming into force of the international regulations and conventions'.⁸¹ Nonetheless, adherence to the

new standards of an existing law will only be imposed during the initial obligation of due diligence.

In order to arrive at a proper conclusion, one may have the notion that there is a close analogical point between, on the one hand, case law that rendered the carrier/shipowner liable for unseaworthiness due to damaged caused by not providing their master and crew with diagrams and plans of the ship's recently fitted equipment or modifications,⁸² and, on the other hand, the future readiness of the court to render the vessel unseaworthy for not fitting the equipment that is required by the industry.

In a nutshell, the failure to fit the vessel with such equipment might render its safety certificates⁸³ invalid or require their renewal, which might cause a delay or prohibit the vessel from proceeding to sea or entering the port. As a result, the claimant cargo interests/

76. To that extent, the charterer will be prevented from trading to some part of the world. *Golden Fleece Maritime Inc v. ST Shipping and Transport Inc (The Elli & The Frixos)* [2008] 2 Lloyd's Rep 119 at p. 127. Sir Anthony Clarke MR concluding 'at a particular South East Asian country suddenly required all fuel oil carrying vessels to be doubled hulled'.
77. *F. C. Bradley & Sons Ltd. v. Federal Steam Navigation Company, supra*, see Lord Justice Scrutton at pp. 454-455. See also *Virginia Co v. Norfolk Shipping Co* 17 Com. Cas. 277 at p. 278.
78. *The T.J. Hooper* 60 F.2d 737, 1932 AMC 1169 (2 Cir. 1932) where Hand J. decided that tugs should be equipped with radios, although their use on such vessels at that time was still not customary. Also see Professor William Tetley, *Marine Cargo Claims* (4th edn, 2008), Chapter 15 'Due Diligence to Make the Ship Seaworthy', at p. 42, taken from Professor Tetley's website: <www.mcgill.ca/maritimelaw/mcc4th/>.
79. In *President of India v. Coast S.S. Co (S.S. Portland Trader)* 213 F. Supp 352 at pp. 356-357, 1963 AMC 649 at p. 654, [1963] 2 Lloyd's Rep. 278 at p. 281 (D. Ore. 1962), The District J commented on the desirability of vessels having radar on board. The judge warned however that in the near future it was most likely that radar would become a condition of seaworthiness. The court said that, with the brilliant clarity of hindsight, it was easy to rationalise how the disaster could have been avoided if the vessel had been equipped with either one of these modern aids to navigation (radar or Loran), but the court has the duty to determine the seaworthiness of the vessel from the standpoint of the commencement of the voyage rather than measuring the standard by what happened at the time of occurrence.
80. A subsequent judgment on this question is *Argo Merchant Lim Procs.* 486 F. Supp. 436 at p. 459. 1980 AMC 1686 at p. 1702 (S.D. N.Y. 1980). Loran was not deemed essential.
81. Sir Michael Wood: 'Lawmaking and implementation in International Shipping: Which Law Do We Obey?', Tenth Cadwallader Memorial Lecture, 1 October 2008. Cited: <www.shippinglbc.com/content/uploads/documents/cad10_mensah.pdf>.
82. See *Robin Hood Flour Mills, Ltd. v. N. M. Paterson & Sons, Ltd., (The Farrandoc)* [1967] 2 Lloyd's Rep. 276.
83. *Golden Fleece Maritime Inc v. ST Shipping and Transport Inc (The Elli & The Frixos)* [2008] 2 Lloyd's Rep 119.

charterers might claim that the vessel is not legally seaworthy due to the lack of certification.⁸⁴

7. Problems of the Current Law – The Need for Improvement

Under the Hague/Hague-Visby Rules, the obligation of due diligence expires upon sailing from the port of loading and does not apply at each stage of the voyage.⁸⁵ Any new requirements under the regulations that govern the standard of the industry will not be adopted after leaving the load port. This is normally the case for an obligation under the Rules which starts and is ongoing until the time the vessel commences her voyage. As this shows, the Rules give no obligation on the part of the shipowner to imposing an ongoing exercise of due diligence, i.e. adopting new regulations during the sea voyage. This apparently avoids the important ongoing duty to keep the vessel in line with the latest regulations, especially those important regulations which, if contravened, will constitute unseaworthiness.

7.1. The Need for New Rules – Prospective of Container Shipping

The English court has expressed the relevant test as being: ‘would a prudent shipowner, if he had known of the defect, have sent the ship to sea in that condition?’ Equally, the test to be applied under the Rotterdam Rules for a vessel that has not adhered to new regulations which may affect her seaworthiness is: ‘would a prudent shipowner, if he had known of the new regulations, have continued the intermediate voyage without affecting any possible compliance?’ In the age of containerised shipping, it seems that vessels are more likely than ever to call into intermediate ports.⁸⁶ This is where the ongoing obligation of due diligence under the Rotterdam Rules becomes more important in solving the problems of unseaworthiness that might arise due to non-compliance with the new regulations, especially in the age of containerised vessels which were invented before the drafting of the Hague/Hague-Visby Rules. Under the later Rules, it is possible that one of two adjacently loaded containers could be subject to different findings on the question of the liability of the carrier, depending on the port of loading.

For instance, assume a vessel commenced her voyage from Port A to Port C and called at Port B with perishable refrigerated cargo onboard. She loaded the container in Port A and was classed as being seaworthy at that time, and then sailed to Port B where she loaded another container destined for Port C. In the course of sailing to Port C, a new regulation came into force. When she arrived at Port C, the vessel was detained for some days by the port state for not having a valid certificate reflecting the compliance with the new regulation, which resulted in the refrigerated cargo being damaged. Subsequently, the vessel would be regarded as seaworthy for the container loaded in Port A, whereas she would be considered unseaworthy for the container that was loaded in Port B. The shipowner,⁸⁷ therefore, will incur the liability for unseaworthiness

for breaching the overriding obligation, thus he is not allowed to use any of the exceptions under Article IV r. 2. On the other hand, for the container loaded in Port A, the shipowner is able to use exceptions under the Article IV r. 2 despite the damage to the cargo which resulted from the same reasons but the effect was different for each of the owners of the containerised cargo.⁸⁸ Therefore, the change brought about by the context of Article 14 of the Rotterdam Rules is likely to lead to fairer consequences in such circumstances. If the Rotterdam Rules governed the bill of lading contract, the court in a case similar to the above would, hypothetically, undoubtedly hold the shipowner in breach of exercising due diligence to provide a seaworthy vessel. There are reasons why an English court would reach a similar decision and would not find a less favourable compliance with a new regulation, such as SOLAS.

Therefore, it is submitted that it would be impossible for a carrier to exercise due diligence mid-voyage or en route for the purpose of keeping the vessel seaworthy.⁸⁹ First, the English court is not unfamiliar with the ongoing duty that was applied on certain occasions to time charterparties, which contained a clause obliging the shipowner to ensure the fitness of his vessel on an

84. Under the SOLAS V 19 & 20 was implemented into domestic law of the UK Merchant Shipping (Survey and Certification) Regulations 1995 (SI 1995/21 and 1692), as amended no UK ship may proceed to sea unless it has been surveyed and there is in force the following certificate(s): -in the case of a passenger ship engaged on international voyages, a Passenger Ship Safety Certificate, or, if the ship is only engaged on short international voyages, a short international voyage Passenger Ship Safety Certificate; in the case of a cargo ship of 300gt or more engaged on international voyages, a Cargo Ship Safety Radio Certificate; in the case of a cargo ship of 500gt or more engaged on international voyages, a Cargo Ship Safety Equipment Certificate and a Cargo Ship Safety Construction Certificate.

85. Article III, r. 1.

86. It is common for container vessels to be involved with large numbers of loading/discharging ports. For instance, a container vessel may load cargo from the Far East destined to North Africa and en route she may call at two ports in the Middle East.

87. In *Leesh River Tea Co. v. British India Steam Navigation Co.* [1966] 2 Lloyd's Rep. 193, it was held that, where seawater damaged cargo due to the pilferage of the cover plate of a storm valve at an intermediate port while loading of another cargo, there was unseaworthiness after loading within the scope of Article 4(2)(q) of the Hague Rules.

88. This principle is applicable even where the containerised cargoes are subject to the same contract of carriage but loaded at different neighbouring ports for the same destination. See F. Berlingier, *The Liability of the Carrier by Sea in Studies on the Revision of the Brussels Conventions on Bills of Lading* (Genoa, 1974), 68 and 95.

89. See Andrew Nicholas, ‘The duties of carriers under the conventions: care and seaworthiness’, in D. R. Thomas (ed.), *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd's List, 2010), para 6.13.

ongoing basis, even in the course of the voyage after the vessel had commenced her trip.⁹⁰ This means that if a case of unseaworthiness occurred after leaving the port of loading, the shipowner, his servants or agents should exercise due diligence to bring the vessel to a seaworthy state.⁹¹ Secondly, the law of doctoring of stages, under common law, is believed to be a good law. It provides some commercial flexibility for vessels to commence their voyage from their loading port without incurring superfluous delays by complying with charterparty obligations to provide a seaworthy vessel. This is, for example, when the condition of the vessel has a deficiency or cannot comply with the regulations at the loading stage which may not amount to a breach of the duty of seaworthiness, provided it is remedied by the sailing stage or at an intermediate stage.⁹² By analogy, the common law⁹³ doctrine of stages with the maintenance of obligation means that the English courts would not find it difficult to adopt a system that renders the vessel seaworthy on calling in at intermediate ports, not only for loading/unloading, but in case of a container vessel exercising due diligence in complying to the latest regulations, such as fitting a small piece of equipment or adding an important publication to the documentations of the vessel, for the purpose of maintaining the obligation of seaworthiness during the course of voyage. It is widely known that nowadays, ports are well-equipped with agents and ship chandlers who are able to provide the vessels with supplies and repair services during their loading/unloading operations.

7.2. Potential Effect of the Rotterdam Rules on the Obligation of Seaworthiness

This raises the issue as to whether the advent of the Rotterdam Rules will lead to a rise the standards shown by the shipowner, to be proactive in furnishing his vessel to a higher standard, i.e. adopting the new regulations of the industry, rather than to react to and adopt them at a later stage. Consequently, he will avoid the breach of the continuous due diligence obligation which is likely to occur. The ISM Code requires the shipowner to establish and maintain procedures for repairs and scheduled regular maintenance for his vessel and to ensure that she is fit and complies with the applicable rules and regulations in a timely manner in respect of the trade, cargo and crew. However, the industry, for newly emerged regulations, allows some flexibility for the shipowner to comply.⁹⁴

The case would be different under the Rotterdam Rules. The additional words 'and during the voyage by sea' in context of Article 14 has addressed an ongoing due diligence to make the vessel seaworthy throughout the course of a voyage. The Rules are expected to raise the standard of due diligence and improve the position of the cargo interests for many reasons. On the one hand, the effect of the Rotterdam Rules, if it was incorporated to the bill of lading or carriage contract, will set aside flexibility in the regulation in regard to their compliance. The obligation to

exercise due diligence to make the vessel seaworthy 'at the beginning of, and during the voyage'⁹⁵ will equally amount to an express clause⁹⁶ that may be surpassed by the obligation 'during the voyage' over the granted flexibility to comply with the regulation instanced by *The Elli and The Frixos* when the Court of Appeal's judgment stated that: 'the vessel is in all aspects eligible under applicable conventions, laws and regulations for trading to and from the ports and place'.⁹⁷ For this purpose, owners will need to comply

90. Maintenance clauses such as NYPE 1946 charterparty in lines 36-38 states the following: 'that the owners shall maintain the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service'. See also NYPE 93 Clause 6 lines 80-82. BALTIME 1939, Clause 3 lines 43-48. GENTIME Clause 11 lines 263-267. Also see the above case *Golden Fleece Maritime Inc v. ST Shipping and Transport Inc (The Elli & The Frixos)* [2008] 2 Lloyd's Rep 119.
91. *Snia v. Suzuki* (1924) 17 Ll.L.Rep. 78, Greer, J. said: 'though that does not mean that she will be in such a state during every minute of the service, it does mean that when she gets into a condition when she is not thoroughly efficient in hull and machinery they will take within a reasonable time reasonable steps to put her into that condition' at p. 88.
92. *The Quebec Marine Insurance Company v. The Commercial Bank of Canada* (1869-71) L.R. 3 P.C. 234. Lord Penzance stated: 'The case of *Dixon v. Sadler* and the other cases which have been cited, leave it beyond doubt that there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward of a whaling voyage, for some definite, well-recognised, and distinctly separate stage of the voyage.' *The Vortigern* [1899], p. 140.
93. The charterparty doctrine of stages, under which the vessel is required to be seaworthy at the commencement of each stage, is not applicable under the Hague/Hague-Visby Rules. See *Leesh River Tea Co v. British India Steam Nav Co* [1966] 2 Lloyd's Rep 193. A vessel was held not to be unseaworthy within the meaning of Art. III when the cargo was damaged by the surreptitious removal of a storm valve plate by a person unknown while the vessel was calling at an intermediate port.
94. For example, the phasing out of single hull tankers for category 2 and 3 built in 1984 or later to be allowed to sail until 2010. Also the IMO does not have to penalise failure to comply. See 'IMO to avoid flag sanctions', *Lloyd's List*, 1 Sept. 1998.
95. Article 14 (Specific obligation applicable to the voyage by sea) of the Rotterdam Rules: 'The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to: (a) Make and keep the ship seaworthy; (b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage ...'.
96. Clause 52 of Shelltime 4: 'Owners warrant that the vessel is in all respects eligible under application (sic) conventions, laws, regulations and ordinances of any international, national, state or local government entity having jurisdiction including, but not limited to, the U.S. Port and Tanker Safety Act, as amended; the U.S. Federal Water Pollution Control Act, as amended; MARPOL 1973/1978 as amended and extended; SOLAS 1974/1978/1983 as amended and extended; and OPA 1990.'
97. *Golden Fleece Maritime Inc v. St Shipping and Transport Inc (The Elli and The Frixos)* [2008] EWCA Civ 548 para. 24.

with the amendments or extensions of the shipping industry, which might affect the trading of the vessel.⁹⁸ In addition, the seriousness of the consequences of a particular kind of non-compliance with a regulation that has not yet been enforced brings up the question of whether the shipowner would be keen to prepare for a compliance in advance before the regulation had become compulsory bearing in mind that the 'compliance with conventions such as MARPOL or SOLAS is [n]ot in itself a meaningless concept' which 'relates to compliance while performing the charterparty service ...'. Clearly, a vessel in dry dock can be modified for compliance more easily than a vessel performing her duty under the charterparty contract.⁹⁹ Therefore, this will make the shipowner keen to comply with the regulations prior to the date of enforcement.¹⁰⁰ On the other hand, commercially speaking, on some occasions it would be more convenient for the shipowner to comply with the regulations in advance of entering into a contract of carriage, such as a liner contract. At a later stage, during the course of performing the contract of carriage, the vessel might be constrained when trading between ports that have no facilities, such as a dry dock, from providing the services required for compliance. It is worth stressing that *The Elli* case alluded to the ongoing obligation. This will make shipowners the bearers of the cost of compliance as well as incurring any financial loss attributed from a delay in compliance.¹⁰¹ The shipowner, being contractually responsible (Rotterdam Rules), would raise the burden of the obligation by making him more conscious of investing in earlier compliance with the relevant regulations.

Furthermore, the standard of 'due diligence of a prudent shipowner, as at the relevant act or omissions, must not be judged in light of hindsight'.¹⁰² It would not be necessary for a shipowner of container vessels to appreciate when a regulation comes into force if the prudent shipowner had complied with such a regulation in advance, prior to the date of enforcement. The shipowner would have set a proper system within the vessel's SMS in order to maintain the regulations as part of the ongoing due diligence obligation and, therefore, comply with any potential regulations to avoid the unseaworthiness of his vessel.¹⁰³ It is for this reason that constant regulations and observances are believed to have a similar effect on the normal routine on the vessel's machinery to provide a seaworthy vessel.

8. Conclusion

It can be concluded that, on the optimistic side, the shipping industry is proving to attach considerable importance to a vessel's seaworthiness. The shipping industry can be said to be increasing, to some extent, the standards of due diligence and minimising the possibility of unseaworthiness for vessels operating at sea. Seaworthiness is a particular aspect that promotes safety and is regulated primarily by the shipping standard conventions, such as SOLAS, Loadline and STCW.

However, the downside is that it is left to the member states to apply these conventions. Some states might apply these conventions more strictly, while others may be more lax, due to poor resources, supervision, enforcement or even inefficiency of convention standards themselves. Consequently, seaworthiness cannot be guaranteed, at least by the relevant conventions. Consequently, standards may be lowered and differences appear between member states applying the conventions with varying degrees of strictness.¹⁰⁴

98. See *Golden Fleece Maritime Inc v. St Shipping and Transport Inc (The Elli and The Frixos)* 1 Lloyd's Rep. 262. Where the inconsistency appears in clause 1(g) between the opening words in the heading 'At the date of delivery of the vessel under this charter' and the requirement within the wording in para (g) to have 'on board all certificates, documents ... required from time to time' was surpassed by the Court of Appeal by giving prevalence to the particular words in sub para (g) over the general words in the heading of para 1, on the basis that 'the particular should prevail over the general'.
99. The nature of the intended voyage may affect the stringency with which the ship is examined before sailing. See for example *The Assunzione* [1956] 2 Lloyd's Rep. 468 at p. 487.
100. The duty of seaworthiness imposed on the carrier under the Rotterdam Rules is that of due diligence, therefore, the test is objective and taking into account international standards and the particular circumstances of the case. See Theodora Nikaki, 'The obligations of carriers to provide seaworthy ships and exercise care', cited as chapter 4 of Rhidian Thomas, *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules: An Analysis of the UN Convention on Contracts for International Carriage of Goods Wholly or Partly by Sea*, (Lawtext Publishing Limited, 2009), at p. 106. See *The Kapitän Sakharov*, [2000] 2 Lloyd's Rep. 255, at p. 266 (where stowage of container under deck is breach of SOLS and IMDG).
101. See Knowles, B. 'Who bears the cost of change?' Vol. 22 No. 6, (July, 2008). ISBN: 1742-9404
102. The owners of cargo lately laden on board the ship *Subro Valour v. The owners of the ship Subro Vega (The Subro Valour)* [1995] 1 Lloyd's Rep. 509 at 516, Clarke J. stated in this case: the plaintiff cargo interests claimed damages against the defendant shipowner in respect of loss to a cargo of peas sustained as a result of a fire on the vessel. The court held that the cause of the fire that made the loss was an electrical fault which was in turn caused by mechanical damage to the wiring. It followed that the vessel was unseaworthy at the commencement of the voyage. No one suggested that conditions during the voyage were in any way unexpected or out of the ordinary.
103. *The Toledo* [1995] 1 Lloyd's Rep. 40 at p. 50. Clarke J. held that the shipowner had failed to exercise due diligence to provide a seaworthy vessel before the vessel commenced her voyage, also he added that a reasonable shipowner would have set up a proper system for the inspection and ascertainment of the internal damage or problems which caused the unseaworthiness.
104. Shipping companies might be encouraged to register their vessels in flag states which have neither administration or independent surveyors, which have promulgated no laws, decrees, orders or regulations and have set no standards for seaworthiness. See Sass, C. A. 'The Enforcement of Safety Standards on Board Merchant Vessels', pp. 66-77, delivered as a paper in the *Fitness at Sea: An International*

Furthermore, not only old vessels can be unseaworthy. Accidents also happen to modern vessels built and equipped to the latest shipping standards but manned by incompetent or inadequate seafarers who have inadequate training from substandard marine schools, or are suffering from fatigue.

In order to improve the effectiveness of shipping industry standards, they should be applied effectively. This can be achieved if the IMO were to create a scheme of sanctions applying to all the states parties to the relevant convention. Such a scheme might include creating a blacklist of shipowners, vessels, marine institutions and especially member states and may withdraw the right to issue certification.¹⁰⁵ Also, the documentation showing that members are giving 'full and complete effect' to the relevant provisions of the convention should be checked by IMO personnel,¹⁰⁶ or it should assign such a task to a reputable entity to check that the standards are strictly applied.

The IMO should also enforce a penalty scheme through their members for shipowners, ship management company or charterers for not complying with the industry's conventions. Furthermore, all member states should enact a system in their law to withdraw certificates of competency for seafarers.¹⁰⁷ Therefore, the IMO should withdraw the certificate of competency of an incompetent crewmember and penalise his employer if that employer was aware of inadequate training or a lack of rest that led to his incompetence.¹⁰⁸

Shipping industry practice conflicts with the current law on seaworthiness as represented by Hague/Hague-Visby Rules. The current law obliges a shipowner to exercise due diligence before and at the beginning of the journey. Whereas shipping industry practice, particularly the STCW Convention and the STCW, demands that the shipowner guarantee compliance throughout the voyage. It is necessary for the continuous validity of certificates of seafarers that no incompetence, for any reason, should emerge after the vessel has sailed. This means that shipowners must make sure that the vessel is seaworthy at all times by providing adequate and competent numbers of crew. It should be noted that the onerousness of the obligation of due diligence sometimes needs to be re-examined during the voyage. If, for example, the vessel encounters unusual problems then the shipowner should 'engage staff of exceptional ability, experience and dependability'.¹⁰⁹ This indicates a necessity to examine the existing law to extend the obligation of due diligence for the whole voyage, as is the case under the Rotterdam Rules.

Conference on Seaworthiness, (9-10, 1980) held at Newcastle University

105. Lord Donaldson of Lymington. 'The ISM Code: The road to discovery?', *Lloyd's Maritime and Commercial Law Quarterly* 4 (1998), 526-534 at p. 532. An example was given on the ISM Code.
106. In order for IMO to carry out such a task, a number of its personnel should be increased. Currently there are only 300 staff.
107. Self-assessment does not make for effective compliance to IMO requirements. IMO resolution A.912(22) on Self-Assessment of Flag State performance provides (in Annex 1 paragraph 5) that a flag state should: 'provide for the enforcement of its national laws, including the associated investigative and penalty processes; take appropriate action against ships flying its flag that fail to comply with applicable requirements; ensure the availability of sufficient personnel with maritime and technical expertise to carry out its flag state responsibilities, including: the development and enforcement of necessary national laws; the establishment and maintenance of minimum safe manning levels onboard ships flying its flag and the provision of effective certification of seafarers; the inspection of ships flying its flag to ensure compliance with the requirements of international instruments to which the flag state is a party; the reporting of casualties and incidents as required by the respective instruments; and the investigation of circumstances following any detention of ships flying its flag.'
108. As far as a British seafarer is concerned, such penalty regimes have already been enacted in law, providing for fines and/or imprisonment for company staff, or the withdrawal of certificates (Section 52 Merchant Shipping Act 1995). Certificate, has been withdrawn, from a seaman who, in the early 1980s, was convicted at Liverpool Magistrates Court, under Section 16 of the Theft Act 1968, of fraudulently obtaining employment. He had claimed to be the holder of a Certificate of Competency as Master (Foreign Going) when, in fact, his only qualification was as Efficient Deck Hand. He had gained employment as a master of two British vessels and attempted to gain employment on a third. One of these vessels became stranded and his employment on the other 'caused extreme financial difficulties for the owners'. He was also known to have sailed as chief officer on at least two foreign vessels, one of which was a 130,000 GRT tanker.
109. *The Hong Kong Fir* [1961] 1 Lloyd's Rep. 159 at p. 169.

